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REPORT OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH.

BY

CHRISTOPHER ROBINSON, ESQ.,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

VOL. XIX.

CONTAINING THE CASES DETERMINED
FROM MICHAELMAS TERM 23 VICTORIA, TO TRINITY TERM 24 VICTORIA:
WITH A TABLE OF THE NAMES OF CASES ARGUED,
AND DIGEST OF THE PRINCIPAL MATTERS.

TORONTO:
HENRY ROWSELL.

1861.

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ROWSSELL & ELLIS, PRINTERS, KING STREET, TORONTO.

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TORONTO:

HENRY ROWSELL.

1881

JUDGES
OF
THE COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS :

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.

“ ARCHIBALD McLEAN, J.

“ ROBERT EASTON BURNS, J.

Attorney-General :

HON. JOHN A. MACDONALD.

Solicitor-General :

HON. JOSEPH C. MORRISON.

A T A B L E

OF THE

NAMES OF CASES REPORTED IN THIS VOLUME.

A.	PAGE.	B.	PAGE.
Ætna Insurance Company, Meagher v.	530	Burley, Campbell, v.....	204
Anglin, J. P., Joice, and, <i>In re</i>	197	Burns v. Boyd.....	547
		Burritt v. Jones	194
B.		Burton et al., Case, v.	540
Bank of Toronto, Fraser, v.....	381		
Bank of Toronto, Feehan, v.....	474	C.	
Bank of Toronto v. Wilmot et al.....	73	Callaghan, Regina, v.....	364
Bank of Upper Canada v. Tarrant... 423		Cameron, Kerr et al., v.....	366
Bathurst, The Trustees of Union		Cameron et al., Foster, v.....	224
School Section No. 2 in, and No. 1,		Campbell v. Burley.....	204
in Burgess, Scott, v.....	28	Campbell v. Davidson.....	222
Beatty et al. v. Ross	370	Campbell v. Howland.....	18
Beeman, Essex Building Society, v... 509		Canada Permanent Building and Sav-	
Begley et ux. v. Gibson.....	458	ings Society v. Rowell	124
Bellhouse et al., Darling et al., v 268		Carrall v. Potter.....	346
Blandford, Trustees of School Section		Carrall, Sheriff, Peers et al., v.....	229
No. 2, in the Township of, O'Leary		Case v. Burton et al.....	540
and	556	Cartwright v. Detlor	210
Boulton v. Jones et al	517	Cawthorne, Brandon, v.....	368
Boyd, Burns, v.....	547	Chadwick, The Corporation of Inger-	
Brandon v. Cawthorne	368	soll, v.....	278, 286
Brant (Corporation of) and Corpora-		Clapp v. Haight	94
tion of Waterloo.....	450	Cleghorn, Ferrie, v.....	241
Brantford, The Corporation of the		Cline, Clouse, v.....	58
Town of, Wade, v.....	207	Clouse v. Cline.....	58
Brown et al. v. Bruce.....	35	Collingwood, the Corporation of the	
Brown, Paton, v.....	337	Village of, Smith, v..	259
Brown v. Garden et al	518	Cool et al., McArthur, v.	476
Brown et al. v. Paxton et al.....	426	Cool v. Switzer et al.....	199
Brown v. Paxton et al.....	238	Corporation of Brant and Corpora-	
Bruce, Brown et al., v.....	35	tion of Waterloo.....	450
Building Society, Canada Permanent		Corporation of the Town of Brantford,	
and Savings Society, v. Rowell... 124		Wade, v.....	207
Building Society, Essex, v. Beeman.. 509		Corporation of the Village of Colling-	
Bull et al., Vanburen, v.....	633	wood, Smith, v.....	259
Bullock, Regina, v.....	513	Corporation of Haldimand v. Martin,	
Burgess, The Trustees of Union		Sheriff.....	178
School Section No. 1 and No. 2, in		Corporation of Ingersoll v. Chad-	
Bathurst, Scott, v.....	28	wick	278, 286

C.	PAGE.	F.	PAGE.
Corporation of Kingston v. City of Kingston Waterworks Company ...	490	Feehan v. The Bank of Toronto	474
Corporation of the Township of Manvers, Shaw et al., and.....	288	Fellowes et al., Regina, v	48
Corporation of the County of Middlesex, Ellwood, v.....	25	Ferrie v. Cleghorn.....	241
Corporation of the Village of Oshawa, McCarthy, v.....	245	Ford v. Langlois.....	312
Corporation (The Provisional) of the County of Peel, Ibson, and.....	174	Ford, Vidal, v.....	88
Corporation of Peterboro', Scott et al, v	469	Fortune et al., McLeod et al., v ...	98, 100
Corporation of the Township of Reach, Ianson, and the.....	591	Foster v. Cameron et al.....	224
Corporation of the Village of Streetsville, Streetsville Plank Road Company, v.	62	Foster et al., Reid, v.	298
Corporation of Toronto, Lazarus, v...	9	Fox et al., The Corporation of the Township of Westminster, v.....	203
Corporation of Waterloo and Corporation of Brant.....	450	Fraser v. Bank of Toronto.....	381
Corporation of the Township of Westminster v. Fox et al.....	203	Fraser v. Mattice et al	150
Coulson, Moffatt et al., v.....	341		
Cowan et al. v. McIntyre et al.....	607	G.	
Crapper v. Paterson et al	160	Garden et al., Brown, v.....	518
Crombie v. Davidson	369	Gaston v. Wald	586
Currie, Paton, v.....	388	Geddes et al., McMaster, v.....	216
		Gibson, Begley et ux., v.....	458
D.		Graham, Edinburgh Life Insurance Company, v.....	581
Dafoe v. Ruttan.....	334	Grand Trunk Railway of Canada, Grimshawe, v.....	493
Dalye v. Robertson.....	411	Grimshawe v. The Grand Trunk Railway Company of Canada.....	493
Darling et al. v. McIntyre, sheriff ...	154	Gurney et al. v. James.....	156
Darling et al. v. Bellhouse et al.....	268		
Davidson, Campbell, v.....	222	H.	
Davidson, Crombie, v.....	369	Haight, Clapp, v.....	94
Dawes v. Wilkinson.....	404	Haldimand, The Corporation of, v. Martin, Sheriff.....	178
Detlor, Cartwright, v.....	210	Hands, Whittier, v.....	170, 172
Dickson, Henderson, v	592	Henderson v. Dickson	592
Dougall et al. v. Moodie.....	568	Hendra v. Moffatt	444
Duross v. Duross.....	77	Hobson and Mann v. The Western Assurance Co.	314, 329
		Houck at al., Markle et al., v	164
E.		Howland, Campbell, v.....	18
Edinburgh Life Insurance Company v. Graham	581	Howland et al., May et al., v	66
Ellis et al., Sisson, v.....	559	Hume, <i>In re</i>	373
Ellwood v. The Corporation of the County of Middlesex.....	25	Hurd v. Levis.....	41
Equitable Insurance Co., Jacobs, v.250, 257			
Essex Building Society v. Beeman... 509		I.	
		Ianson and the Corporation of the Township of Reach.....	591
		Ibson and the Provisional Corporation of the County of Peel.....	174

TABLE OF CASES.

vii.

I.	PAGE.	M.	PAGE.
Ingersoll, The Corporation of, v. Chadwick	278, 286	Moffatt et al. v. Robertson et al.....	401
J.		Moodie, Dougall et al., v.....	568
Jacobs v. The Equitable Insurance Company	250, 257	Morphy, McLaren et al., v.....	609
James, Gurney et al., v.....	156	Moylan, Regina, v.....	521
Joice and Anglin, J. P., <i>In re</i>	197	Murdoff, McMullin, v.....	506
Jones et al., Boulton, v.....	517	Mc.	
Jones, Burritt, v.....	194	McArthur v. Cool et al.....	476
K.		McCarrall v. Watkins et al.....	248
Kerr et al. v. Cameron	366	McCarthy v. The Corporation of the Village of Oshawa	245
Killens v. Street.....	364, note (a)	Macdonald, Macdonell, v.....	130
Kingston (Corporation of) v. The City of Kingston Waterworks Company.	490	Macdonell v. Macdonald.....	130
Kingston Waterworks Company, The Corporation of Kingston, v.....	490	McElderry et al., Regina, v.....	168
L.		McGuire v. Laing	508
Laing, McGuire, v.....	508	McIntyre, Darling, v	154
Langlois, Ford, v	312	McIntyre et al., Cowan et al., v..	607
Lazarus v. The City of Toronto	9	McLaren et al. v. Morphy.....	609
Leith v. O'Neill et al.....	233	McLeod et al. v. Fortune et al.....	98, 100
Leonard v. Sutherland	301	McMaster v. Geddes et al.....	216
Levis, Hurd, v.....	41	McMillan v. Rankin et al.....	356
Lottridge et al., Peebles et al., v.....	627	McMullin v. Murdoff	506
M.		N.	
Macdonald, Macdonell, v.....	130	Nicholson et al., executors, Smith, v.	27
Mann and Hobson v. The Western Assurance Company	314, 329	O.	
Manvers, The Corporation of the Township of, Shaw et al., and.....	288	O'Leary and the Trustees of School Section No. 2, in the Township of Blandford.....	556
Markle et al. v. Houck et al.....	164	O'Neill et al., Leith, v.....	233
Marshall Woodbury and wife, and, <i>In re</i>	597	Orr v. Spooner	601
Martin v. Weld et al.....	631	Oshawa, The Corporation of, McCarthy, v.....	245
Martin (Sheriff) The Corporation of Haldimand, v.....	178	P.	
Mattice et al., Fraser, v.....	150	Park v. The Phoenix Insurance Co.	110
May et al. v. Howland et al.....	66	Paterson et al., Crapper, v.....	160
Meagher v. The Ætna Insurance Company.....	530	Paton v. Brown.....	337
Middlebrook et al. v. Thompson (Sheriff.).....	307	Paton v. Currie.....	388
Middlesex, The Corporation of the County of, Ellwood, v	25	Paxton et al., Brown, v.....	238
Moffatt et al. v. Coulson	341	Paxton et al., Brown et al., v.....	426
Moffatt, Hendra, v	444	Peebles v. Lottridge et al.....	627
		Peel, Provisional Corporation of the County of, Ibson, and the.....	174
		Peers et al. v. Carrall (Sheriff).....	229
		Peterborough, The Corporation of, Scott et al., v	469
		Phoenix Insurance Company, Park, v.	110
		Port Bruce Harbour Company, Webb, v.....	614, 623

P.	PAGE.	S.	PAGE.
Potter, Carrall, v.....	346	Street, Killens, v.....	364, note (a)
Provincial Insurance Company v.		Sutherland, Leonard, v	301
Shaw ..	360	Switzer et al., Cool, v.....	199
Provincial Insurance Company v.			
Shaw	533	T.	
R.		Tarrant, Bank of Upper Canada, v...	423
Rankin et al., McMillan, v.....	356	Thomas and Beatty v. Ross.....	370
Reach, The Corporation of the Town-		Thompson, Sheriff, Middlebrook et	
ship of, Ianson, and.....	591	al., v.....	307
Regina v. Moylan	521	Toronto, The Bank of, v. Wilmot et al.	73
Regina v. Bullock	513	Toronto, Bank of, Fraser, v.....	381
Regina v. Callaghan	364	Toronto, The Bank of, Feehan, v...	474
Regina v. Fellowes et al.....	48	Toronto, The City of, Lazarus, v.....	9
Regina v. McElderry et al.....	168	Trustees of Union School Section No.	
Reid v. Foster et al	298	2, in Bathurst, and No. 1, in Bur-	
Robertson, Dalve, v.	411	gess, Scott, v.....	28
Robertson et al., Moffatt et al., v.....	401	Trustees of School Section No. 2, in	
Ross, Thomas and Beatty, v.....	370	the Township of Blandford, O'Leary	
Ross et al., Tucker, v.....	295	and the	556
Rowell, Canada Permanent Building		Tucker v. Ross et al.....	295
and Savings Society, v.....	124		
Ruttan, Dafoe, v.....	334	V.	
S.		Vanburen v. Bull et al.....	633
Salmon, Shaw, v.....	512	Vanveleck et al. v. Stewart et al	489
Scott et al. v. The Corporation of		Vidal v. Ford	88
Peterborough	469		
Scott v. The Trustees of Union School		W.	
Section No. 1, in Burgess, and No.		Wade v. The Corporation of the Town	
2, in Bathurst	28	of Brantford	207
Scouler, Scouler et al., v.....	106	Wald, Gaston, v.....	586
Shaw et al. and the Corporation of		Waterloo, The Corporation of, and	
the Township of Manvers.....	288	the Corporation of Brant	450
Shaw, Provincial Insurance Company v.	360	Watkins et al., McCarrall, v.....	248
Shaw, The Provincial Insurance Com-		Webb v. The Port Bruce Harbour	
pany of Canada, v.....	538	Company.....	615
Shaw v. Salmon	512	The same case, in appeal	623
Sisson v. Ellis et al	559	Weld et al., Martin, v.....	631
Smith v. The Corporation of The Vil-		Western Assurance Company, Mann	
lage of Collingwood.....	259	and Hobson, v.....	314, 329
Smith v. Nicholson et al., Executors.	27	Westminster, Corporation of the Town-	
Spooner, Orr, v	601	ship of, v. Fox et al.	203
Stewart et al., Vanveleck et al., v.....	489	Whittier v. Hands.....	170, 172
Streetsville, The Corporation of the		Wilmot et al., Bank of Toronto, v...	73
Village of, Streetsville Plank Road		Wilkinson, Dawes, v.....	604
Company, v.....	62	Wilson v. Wittrock	391
Streetsville Plank Road Company v.		Wittrock v. Wilson.....	391
The Corporation of the Village of		Woodbury and wife, and Marshall,	
Streetsville	62	In re.....	597

REPORT OF CASES
IN THE
COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 23 VICTORIA, 1859, (*Continued*).

Present:

THE HON. SIR JOHN BEVERLEY ROBINSON, BART, C. J.

“ ARCHIBALD McLEAN, J.

“ ROBERT EASTON BURNS, J.

LAZARUS V. THE CORPORATION OF THE CITY OF TORONTO.

Snow falling from roof—Injury thereby—Liability.

There is no duty at common law upon owners or occupiers of houses to remove snow from the roof, and no liability for accidents caused by its falling.

The defendants, a city corporation, owning land in the city, leased it to one H. upon certain conditions as to building, and he erected a house upon it under the directions of their architect. The lower story was occupied by one S. as lessee of H., and the upper story and garret by defendants. There was no evidence of any fault or negligent construction of the house or roof, nor of any by-law passed by defendants to regulate the removal of snow. The plaintiff having been injured while passing along the street by snow falling from the roof. *Held*, that defendants were not liable.

This was an action brought for injury caused to the plaintiff by the falling of snow from the roof of a house in King Street, in the city of Toronto. The declaration contained two counts.

First count.—That the defendants were and are the tenants and occupants of the upper part of a certain house and premises on King Street in the City of Toronto, being

part of St. Lawrence Hall, and it therefore became the duty of the defendants to clear the snow off the roof of the said house and premises, and to prevent the snow from collecting and accumulating on the said roof in such quantities and in such a position that it became liable to fall and descend therefrom, to the danger of persons passing along the said street; but the defendants wrongfully and injuriously neglected this said duty, and failed and omitted to remove and clear off the said snow from the said roof, whereby a large quantity thereof descended and fell from the said roof with great force and violence upon the plaintiff, who then was lawfully walking and passing along the said street in front of the said house and premises, and knocked the plaintiff down, and caused her great and permanent injury by producing congestion of the brain, and destroying the sight of one of the plaintiff's eyes, whereby she was put to great pain and loss, and obliged to pay and expend large sums of money in and for physicians and medical attendance, and was prevented from following her usual occupation as governess, and has been rendered permanently unable to follow her said occupation or profession.

Second count.—That the defendants, being the owners of a certain lot of land on King Street, in the City of Toronto, caused to be built and erected thereon a certain house, being part of the buildings known as the St. Lawrence Hall, upon and adjacent to a certain highway and public thoroughfare in the said city, known as King Street, and therefore it became and was the duty of the defendants to build and construct, and cause to be built and constructed, the roof of the said house in such a skilful manner that the snow collecting thereon should not fall and descend with force and violence in a large mass in and upon the said street, to the danger and injury of persons lawfully passing and going over and along the said highway and thoroughfare; yet the defendants, contrary to their duty in that behalf, so negligently and unskilfully caused the roof of the said house to be constructed, that the snow which collected thereon suddenly and with great force and violence descended and fell on the plaintiff, then lawfully passing along

the said street or highway in front of the said house and premises, and knocked the plaintiff down, &c., &c., as in the first count.

Pleas.—1. Not guilty. 2. That before and at the time of the committing of the said alleged grievances the defendants were the owners in fee of the said lot or piece of ground on which the said house was standing, and that long before the said time when, &c., by a certain lease made by the defendants under their corporate seal, the said lot or piece of ground was let for a term of years, which had not at the time when, &c., nor has yet expired, to one Thomas Hutchinson, and that the said Thomas Hutchinson at the same time when, &c. occupied the said house as the tenant thereof under the said lease to the defendants, and as such tenant it was the duty of the said Thomas Hutchinson, and not of the defendants, to remove and clear away the accumulation of snow from the roof the said house, at the said time when, &c.

Replication, to the second plea.—That the said defendants, before and at the time of the committing of the grievances in the declaration mentioned, became and were the tenants and occupants of the upper part, and that part immediately under and next to the roof of the said house and premises in the first count of the said declaration mentioned, whereby it became and was the duty of the said defendants to clear away and remove the snow, as in the first count alleged.

The trial took place at Toronto, before *Draper*, C. J., when a verdict was given for the plaintiff, and £100 damages, subject to the opinion of the court on the law and evidence, the court to determine the plaintiff's legal right to recover on the evidence given.

The facts of the case are stated in the judgments.

Hector Cameron for the plaintiff, cited *Broom* Leg. Max. 330; *Fay v. Prentice*, 1 C. B. 828; *Regina v. Watts*, 1 Salk. 357; *Bishop v. The Trustees of the Bedford Charity Estate*, 33 L. T. Rep. 27; *McCallum v. Hutchison*, 7 C. P. 508; *Barnes v. Ward*, 9 C. B. 392.

Cameron, Q. C., contra, cited *Holden v. Liverpool New Gas Company*, 3 C. B. 1.

ROBINSON, C. J.—The evidence given upon the trial, proved that the plaintiff was walking on the 7th of December, 1858, in the street, along the front of Sargant's store, which forms part of the building called St. Lawrence Hall in Toronto, and on the same side of the street: that a quantity of snow slid down from the roof of Sargant's store and struck her on the head, throwing her down, and occasioning her very serious injury, from which at the time of the trial in October last she had not fully recovered.

The defendants own the land on which the building is erected from which the snow fell. They leased to Mr. Hutchinson a piece of ground adjoining what is properly St. Lawrence Hall, upon certain conditions as to building. Hutchinson gave a bond to build such a building as the corporation would approve of, and he built his house under the directions of the city architect.

The defendants occupy the garrett of that building, and the floor next below it, over Sargant's store.

The city are bound by their lease from Hutchinson to repair the premises occupied by them. The only way of getting on the roof from the inside is through the garret occupied by the defendants, but Mr. Hutchinson stated that he did not know that there was any access to the roof from that part. The roof over Sargant's store slopes at two angles, the lower part of the roof being more precipitous than the upper part. The roof of the St. Lawrence Hall is higher than the other. The two roofs are covered with slate.

It was sworn by Mr. Hutchinson that he had seen snow fall from the same roof occasionally, but had not known of any damage being done before.

The defendants contend that if the injury did occur in the manner stated in the declaration, and if in consequence the plaintiff had a good cause of action against any one, it could only be against the owner or tenant of the house from which the snow fell, not against the defendants, who were the sub-tenants only of the upper part of the house: that the evidence shewed a faulty construction of the roof, rather than a neglect to clear off the snow: that it did not sustain

the first count, for it did not shew that the snow came from the building mentioned in it, but the snow may have fallen from St. Lawrence Hall: that as to the second count, which charges that the roof was negligently constructed, it was not the defendants who built the house mentioned in it, but Hutchinson; and although he may have been obliged to build it under the superintendence and direction of the defendants' architect, still that cannot make the defendants liable to a third party, as if they had built the house.

The Municipal Act 22 Vic., ch. 99, sec. 290, sub-sec. 12, provides that the municipal council of every city may pass by-laws for compelling persons to remove the snow from the roofs of the premises owned or occupied by them. It was not shewn that any by law had been made by the Corporation of Toronto, and that the defendants had infringed it, and I do not see in the evidence such proof of negligence as should render the owner or occupier of the house from which the snow fell liable to an action. What occurred here was such an accident as may occasionally happen, and be attended with serious results, but I do not think that in the absence of any public regulation on the subject people are compelled to keep the roofs of their houses clear of snow, or to detain the snow on the roofs so that the snow cannot slide from them into the street. There may be in a particular case something so evidently faulty in the construction of a roof as to make it more likely to occasion accidents from this cause than roofs in general are, but I do not see any proof that such was the case here.

If that had been shewn, however, then on whom would it be incumbent in this case to make compensation?

In both counts the defendants are charged as liable for the snow falling from the house along the front of which the plaintiff was walking: that is, from the shop referred to in the declaration.

The principles of law which govern the remedy against the owner or the occupier of property on which a nuisance has been created or exists is very fully gone into in the case of *Rich v. Basterfield* (4 C. B. 783), in which a great number of authorities are cited. The first count in this declaration

charges the defendants with neglecting to remove the snow from the building in question ; but as owners of the land merely they had no such duty incumbent on them, and they are not charged on that ground, but because they occupied the upper part of the house. No case has been cited for the position that a tenant of part of a house has the duty cast upon him of taking care that the building generally is not the cause of injury to others. If any one would be liable to this action by reason of occupation, it must be, I think, the lessee of the whole building. The defendants have no particular charge of the roof because they occupy the room next below it.

As to the second count, it does not appear to me to have been proved that there was any thing unskilful and negligent in the construction of the building, and if there was, there was nothing in the evidence, as it seems to me, that would make the defendants liable as if the house had been built by them, or for them, which it was not, but by Hutchinson, under the conditions of his lease. The defendants were the owners of the soil. They did not let it with the house in question built upon it, nor did they afterwards build the house upon it, but their tenant built it; and though it was done under the superintendence of the defendants' architect, yet that does not, I think, establish that the defendants built the house, and unless they either built, or own, or occupy a house which is necessarily a nuisance, and not merely from want of care in the owner or occupier of the building, they cannot be liable in this action.

In my opinion the *postea* should go to the defendants.

BURNS, J.—There is not any evidence to support the second count, for the building from which the snow fell upon the plaintiff was not erected by the defendants. The defendants owned the land in fee, but had leased it for years to those who erected the buildings, and though it appears the buildings were erected according to a plan furnished by the defendants, yet that fact cannot make them the builders or create any duty upon them. What the plaintiff desires to make out as supporting that count is that the centre

being the St. Lawrence Hall had its roof constructed in such a way as that the snow slid from that roof to the other, the roof of the latter being constructed at right angles, or at an angle which caused the snow resting upon the latter to slide into the street. If the fact had been as suggested by the plaintiff, still it would have been a question whether the defendants were liable under the circumstances, but the facts were not proved as suggested, there being no evidence whatever that the snow first fell upon the St. Lawrence Hall and then slid upon the other roof before again falling into the street. All this part of the proposition advanced by the plaintiff rests upon theory only. Perhaps the theory might be quite correct if applied to rain falling in such quantities that the gutters or appliances to carry off the water from St. Lawrence Hall were insufficient for the purpose, but I apprehend the same rule cannot be held with respect to snow, which we know blows and drifts about in every way the eddies of the wind carry it. The fact of the St. Lawrence Hall being so much higher than the adjoining building would I think of itself furnish very strong evidence that snow would not and could not in the nature of things rest in any quantity upon the roof of the higher building, that is St. Lawrence Hall, so as to slide in that way. I know of no law which would render a person liable to a stranger because he builds his house higher than his neighbour adjoining him, by means of which eddies are created in the atmosphere, drawing more snow to one locality than another.

The first count charges the defendants with the duty of cleaning the snow off the roof of the building from which the snow fell into the street, merely because the corporation were the tenants of the upper rooms. The building is divided into separate tenements, and the defendants occupy the upper suite of rooms, and the lower part is occupied as a store or shop. Suppose that both set of tenants were or that they were separately liable, and that an action might either join all or be brought against each, the question would be whether there is such a duty as that alleged in this count. I am not aware that any common law duty is

attached to the owners of houses to clear the snow from the roofs. This case is different from those cited by the plaintiff's counsel. In each of those we find that the owner or proprietor has done something *actively* upon his premises, which either directly causes the injury, or neglecting to do something which he should have done to guard against his act, an injury has been sustained. In this case the tenants have done nothing actively; they are the *passive* subjects of the elements. If there had been no house built upon the land at all, I apprehend that the owners were not by any common law duty bound to have removed the snow which fell upon the land. And if the snow had slid upon the ground, and thereby caused an injury, it could have been considered in no other light than an operation of nature, of which every one must take his share, and no one would be answerable for the consequences. Instead, however, of allowing the land to remain in a state of nature, the proprietor covers it with a house, which of necessity must be constructed so as to render it habitable, and therefore a roof required.

I find the law stated upon this subject in Domat better than any where else. "He who, in making a new work upon his own estate uses his right without trespassing either against any law, custom, title or possession, which may subject him to any service towards his neighbours, is not answerable for the damage which they may chance to sustain thereby, unless it be that he made that change merely with a view to hurt others, without any advantage to himself. For in this case it would be a pure act of malice, which equity would not allow of. But if the work were useful to him, as if he made in his estate any lawful repairs to secure it against the overflowings of a torrent or river, and his neighbour's grounds were thereby the more exposed to the flood, or suffered from thence any other inconvenience, he could not be made answerable for it." (Dom. C. L. Sec. 1581, by Strahan.)

There was no evidence offered in this case to shew that the roof of the building was improperly constructed, or different from the roofs of other houses in the city, so that

it was a nuisance to people passing and re-passing. The evidence shews that snow was seen occasionally to fall from the roof, but not to do any damage. I suppose we must take judicial notice of the general character of the weather at the different seasons of the year, and know that snow while the thermometer is below the freezing point will be apt to remain some time where it may be deposited by the atmosphere. I know of no obligation imposed at common law, where people use their property in a manner similar to all others, to do any act to guard other persons against the acts of nature. This count assumes, from the fact of snow having fallen from the roof, and the plaintiff having sustained a severe and serious injury, that it was the duty of defendants to have removed the snow from the roof of the house. It is not complained against the defendants that they have done any thing which creates a nuisance, and no evidence of any injury having been sustained from a like cause has been given, except in this one instance.

It is said in the civil law, if tiles fall from the roof of a house which was in good case, and by the bare effect of a storm, the damage which may happen by such fall is an accident for which the proprietor or tenant of the house cannot be made accountable. But if the roof was in a bad condition, he who was bound to keep it in repair may be liable to make good the damage that has happened, according to the circumstances.

It may be inconvenient to people living in cities to be subject to snow falling from the roofs of houses, but what is claimed in this declaration would apply as a duty all over the province, and I imagine the people living in the country or scattered villages would think it very strange if they were told it was their duty to clear the snow off the roofs of their buildings, when it is a well-known fact that they depend upon the melting of the snow which lies upon the roofs for water for many domestic purposes during the winter.

The best proof, however, that it was considered necessary there should be some law enacted upon the subject of removing snow from the roofs of houses in cities, is that the authority to do so is conferred by the 12th sub-section of section 290, of

the Municipal Corporations Act, 1858, but I do not find there was any specific mention of such authority before that. The accident in this case is stated to have occurred in December, 1858, which would be after the act of parliament came into force, but we have not been informed whether the city council has ever passed any by-law upon the subject, and before such by-law be passed there is no duty existing upon people living in cities more than in the country.

I do not see that we can help the plaintiff in any way upon this record, or by assistance of the evidence given at the trial, and therefore I think that the *postea* must go to the defendants.

McLEAN, J., concurred.

Judgment for defendants.

CAMPBELL V. HOWLAND.

Award—Costs of actions decided before reference—Evidence of arbitrators as to matters in difference.

To an action on an award defendant pleaded a set-off for costs of defence in certain suits due to him by the same award. The award when produced recited a submission of a certain action commenced in the Common Pleas by the plaintiff against defendant, and also of "all other matters of difference, action and actions, suits, and controversies whatsoever," and awarded that defendant should pay all costs of said suit in the Common Pleas, "and all other law costs occasioned by any suit or suits, action or actions, either at law or equity, had about and regarding the premises, and brought before the execution of said bonds of submission to arbitration; and we also order and direct that no further proceedings shall be had in any or either of said actions."

Held, affirming the judgment of the county court, that the defendant could not under his plea recover for costs of suits in which judgment had been given before the reference, for they were not included by the terms either of the submission or award.

Held, also, that evidence of the arbitrators was rightly received, to shew that such costs were not intended to be allowed.

APPEAL from the county court of the county of Ontario.

Action upon an award in favour of plaintiff against defendant for \$335, by C., I., and D., arbitrators.

Defendant pleaded a set-off for money due from the plaintiff upon and by virtue of an award made by C., I., and D., by virtue of a certain submission made by the defendant and the plaintiff to the award of the said C., I., and D., and concerning a certain action, which had been commenced in the

court of Common Pleas, at Toronto, on the 5th of February, 1859, wherein the said John Campbell was plaintiff and the said Archibald Howland was defendant, and all actions, suits, controversies, accounts, reckoning, matters and things relating thereto, and all other matters in difference then pending between them, and upon and by virtue of which said reference the said C., I., and D., awarded that the plaintiff should pay the defendant all the costs of said suit in said court of Common Pleas, and all other law costs occasioned by any suit or suits, action or actions, either in law or in equity, had about and regarding the premises, and brought before the execution of said submission to arbitration.

The award produced and proved at the trial, made by C., I., and D., recited a submission to them by the plaintiff and defendant, "of and concerning a certain action which had been commenced in the court of Common Pleas by the said Campbell against the said Howland, on the 5th of February, 1859, and also regarding certain differences which had arisen regarding certain trespasses alleged to have been committed and done by said Howland upon certain lands and premises of the said Campbell, and also for certain alleged conversions by the said Howland of certain goods and chattels of the said Campbell, and also for and respecting certain matters of account between them, as well as all other matters of difference, action and actions, suit and suits, and controversies whatsoever," and awarded concerning the said premises, "that the said Archibald Howland, his executors or administrators, shall and do well and truly pay or cause to be paid to the said John Campbell, his executors or administrators, on or before the 18th day of July next, the sum of \$335: that the said John Campbell shall pay all costs of said suit in the court of Common Pleas, and all other law costs occasioned by any suit or suits, action or actions, either in law or in equity, had about and regarding the premises, and brought before the execution of said bonds of submission to arbitration; and we also order and direct that no further proceeding shall be had in any or either of said actions."

At the trial two of the arbitrators were examined, and

proved that by that part of the award relating to costs, they intended only to allow defendant costs in one suit, which was then pending in the Common Pleas, and did not mean to interfere in the former suits which had been pending between these parties, but which had been determined by judgment. This evidence was tendered by the plaintiff to meet a set-off by defendant made up of costs of former suits between these parties, but which had been closed by judgment and execution.

The reception of this evidence was objected to, but the learned judge allowed it to go to the jury, subject to the plaintiff moving in term to enter a verdict for him, in case the jury should find for the defendant, for the full amount of the award, or for such less sum as the court should find to be due to him after deducting the costs of the action which was pending at the time the reference was made from the amount of the award. And should the jury find for the plaintiff, and reject defendant's set-off, then it was agreed that the defendant should have the right to move to enter a verdict for him, or to reduce the plaintiff's verdict, as the court should find the law on the subject of the arbitrators being allowed to give evidence in explanation of their award, or as they should interpret the award without the aid of such evidence.

The defendant proved that his set-off for costs of old suits closed by judgment before the reference was made, amounted to \$445.10, and the costs of the suit pending when the reference was made amounted to \$40.88, making together the sum of \$485.98. The award was for the sum of \$335.

The jury found for defendant, and £31 damages—\$124.

They further found specially that all costs, as well of those suits which had been closed by judgment before the reference was made, as of the suit which was pending at the time of the reference, (notwithstanding the arbitrators swore differently,) were included in the award, and had been considered and allowed by the arbitrators.

The plaintiff moved in term to set aside the defendant's verdict, and to enter a verdict for the plaintiff pursuant to leave reserved, or for a new trial on grounds of misdirection,

&c., and after argument the judgment of the court was as follows :—

Burnham, J.—Arbitrators may, if they choose, give evidence of the several matters adjudicated upon by them under the reference, and such evidence is receivable, if tendered, in explanation of their award, either as to the language used in the award or the actual extent to which the arbitrators received evidence and intended their award to operate.—4 Esp. 181.

2ndly.—The portion of the award which contains the adjudication does not extend so far as to include the costs of those former suits which have been closed by the judgment of the court before the reference, and therefore no longer forming matters in difference between the parties, neither were they included in the reference, (judging from the recitals contained in the award.)

I am therefore of opinion that the question of those costs was not referred nor arbitrated upon, and that the award does not, according to my interpretation of its language, embrace any such matters.

I make the rule absolute, without reference to any other question raised by the plaintiff, to set aside the verdict for defendant, and to enter a verdict for the plaintiff for \$294.12, being the amount of the award, less the \$40.88, the amount of defendant's costs in the action pending at the time of the reference.

From this judgment the defendant appealed.

Adam Wilson, Q. C., for the appeal, cited *Regina v. Hardey*, 14 Q. B. 509; *Faviell v. Eastern Counties R. W. Co.*, 2 Ex. 344; *Gordon v. Mitchell*, 3 Moore 241; *Lusty v. VanVolkenburgh*, 1 U. C. R. 214.

Richards, Q. C., contra, cited *Rees v. Waters*, 16 M. & W. 263; *Trimingham v. Trimingham*, 4 N. & M. 786; *Ravel v. Farmer*, 4 T. R. 146; *Martin v. Thornton*, 4 Esp. 180; *Russell on Awards*, 528, 535-6.

ROBINSON, C. J.—We affirm the judgment of the county court judge in this case.

There seems not to be the slightest reason to doubt the justice of his decision; and we think the case is equally clear in favour of the plaintiff in point of law.

No doubt a submission between the parties may extend to claims which they may have against each other upon judgments, as well as other demands, for it may be a matter in difference between them whether such judgments have or have not been wholly or in part discharged. And it is not necessary to determine whether parties cannot, if they choose, open a matter that has been adjudicated upon, and leave it to arbitrators to determine whether a judgment that has been obtained shall be enforced or not, and for how much. But then the submission ought to be such as to leave no doubt that that was intended, for otherwise it could never be supposed that what was settled by judgment was intended to be submitted as a matter still in difference, in such a sense as would enable the arbitrators to reverse the judgment of a court of law.

The submission here contains not a word that shews this to have been intended, but the contrary intention is plain, I think, so that if the arbitrators had in their award directed costs to be refunded by the plaintiff, which had been adjudged to him by a final judgment, the award could not in that respect have been upheld. But the award really does nothing of the kind; it gives no intimation that the arbitrators had taken upon themselves to reverse any judgment as regarded the costs awarded to the plaintiff by such judgment. On the contrary, it speaks of costs occasioned by *suits* and actions commenced before the submission, and it directs that the plaintiff shall pay the costs of such suits, and that they shall be no further prosecuted.

A judgment makes an end of a suit or action. After judgment has been given it is no longer pending, and could be no further proceeded in, except for the mere purpose of enforcing payment.

The judge was quite right, we think, in allowing the arbitrators to give evidence that no such matter was in difference before them. There is abundant authority for that, and it is by such evidence that courts in general are enabled to see whether a certain matter has been awarded upon or not.

There could be no pretence here for holding that it had been submitted to the arbitrators to go into matters that had at any time been settled by final judgment, for there are no words in the bond that can be so construed. It could only therefore be under the general words of "all matters in difference," that the defendant could hope to introduce any such matter, and by shewing that in fact the costs taxed on entering certain judgments were matters in difference.

Whether he could so support his set-off or not, it is at least certain that he might be met in such an attempt by shewing that there was in fact no such matter in difference before the arbitrators.

BURNS, J.—There can be no doubt the explanation given by the arbitrators who were examined at the trial in respect of the costs is quite correct, but the question is whether we must hold that the costs which the defendant wanted to set off were within the scope of the reference, and by the terms of the award have been disposed of in such a way that the defendant was entitled to claim them.

The proposition stated by the defendant is a novel one, and one that a person is not inclined to favour, which is this :—that suits which have been settled by the judgment of the court, and in which costs have been awarded and paid upon execution, may not only be opened upon the general words used in the submission in this case, but that according to those words the arbitrators had a right to give the defendant his costs of defending those suits which the courts have adjudged against the defendant. The parties might undoubtedly have opened up matters already adjudicated upon if they pleased to do so, but then we must see whether they intend that, and also must see whether they have given the arbitrators the power. I lay out of question the evidence given upon that point by the arbitrators for the purpose of the examination, and to determine whether the arbitrators have disposed of costs of suits already adjudicated upon I will simply look at the award and at the reference.

The arbitrators say in their award that they direct that the plaintiff shall pay all costs of the suit which was refer-

red—that suit, according to the recitals, being one pending at the time of the reference—and then say, *and all other costs occasioned by any suit or suits, action or actions, either in law or equity, had about and regarding the premises, and brought before the execution of the bond of submission.*

The first question which arises upon this is, whether the natural and obvious meaning of the arbitrators is not that the other costs they meant to dispose of were not costs of any other suits or actions which might be pending as well as the one spoken of. It seems to me that is the proper meaning of what they have said. An action that has been closed by judgment and execution, and the execution paid, cannot be said to be any longer pending. It is no longer a matter in controversy unless the parties choose to open it by an express condition upon the subject. But, secondly, before the language of the award could be applied as the defendant in this case desires, it would require, I think, to be shewn that the actions, the costs of which the defendant wished to set-off, were actions *had about and regarding the premises*: that is, the premises which were referred. Now, that does not appear to have been shewn at the trial.

Beyond the language of the award, we must turn to that of the submission, for by that the acts and doings of the arbitrators in the making of their award must be interpreted. In reading the reference we find the parties gave the arbitrators power over the costs of an action then pending in the Court of Common Pleas, and which action with other matters were referred, and among others *all action or actions, suit or suits, and controversies whatsoever.* Now an action that has been pending and closed by the judgment of the court is no longer an action or controversy. The parties may re-open it if they chose, and refer it to arbitration, but that fact should I think be apparent. We should see that the parties so intended; it should not be inferred from the use of the general words. Those words in my opinion can only mean actions or suits which are still open for consideration, and cannot be interpreted to mean the opening up judgments of the courts already given. An action is at an end when judgment is pronounced and entered up, unless

opened on appeal. It appears to me, if parties intend to open it by reference to arbitration they should say in distinct terms, or at all events in such language as leaves no room for doubt, that it is intended to open it as an appeal. When we find them referring a suit which is then pending, with all other matters in difference, and all other actions and suits, the principal thing certainly would seem to be the pending suit and matters connected with it, and the general words I apprehend will receive a similar construction, that is, of actions and suits then pending.

It does not appear to me the arbitrators had any authority whatever given to them of making the plaintiff pay costs of suits already before the reference determined in his favour, and I do not interpret that they either have awarded or intended to award that the plaintiff should pay such costs.

I think the judgment of the judge of the County Court was right, and that this appeal should be dismissed with costs.

McLEAN, J., concurred.

Appeal dismissed with costs.

ELLWOOD V. THE CORPORATION OF THE COUNTY OF MIDDLESEX.

Award—"Submission," and "reference"—Meaning of—Want of Finality—Pleading.

By a submission the costs of the "reference and award" were to be in the discretion of the arbitrators, and they directed that the defendants should pay the costs of the "submission and award."

Held, that the award was final, for that the costs of the submission included the costs of reference.

The submission and award being set out in full in the declaration, *quære*, whether this objection could be raised by plea, or whether defendant should not have demurred.

ACTION on an award. By the submission as set out in the declaration, the costs of the cause that was pending were to abide the event, and the costs of the "reference and award" were to be in the discretion of the arbitrators.

The award sued on directed that the defendants should pay "the costs of the submission and award."

The defendants pleaded that the award was not final,

because it did not determine the costs of the reference, which were included in the bond of submission, and this plea was demurred to.

Read, Q. C., and *M. C. Cameron*, for the demurrer, cited *Russell on Awards*, 373; *Young v. Gye*, 10 Moore, 198; *Mackintosh v. Blyth*, 1 Bing. 269; *Goodall v. Ray*, 4 Dowl. 1; *Hewlett v. Laycock*, 2 C. & P. 574; *Adcock v. Wood*, 6 Ex. 819.

Connor, Q. C.; contra, cited *Williams v. Wilson*, 9 Ex. 99; *Dresser v. Stansfield*, 14 M. & W. 822; *Edwards v. Great Western Railway Co.*, 12 C. B. 419; *Browne v. Marsden*, 1 H. Bl. 223; *Bradley v. Tunston*, 1 B. & P. 34; *Brown v. Nelson*, 13 M. & W. 397.

ROBINSON, C. J., delivered the judgment of the court.

It appears to us that there is no ground for the objection that the award is not final for the reason alleged. The costs of the submission include, we think, all the costs of the reference.

It would be unfortunate if the courts increased the risk of awards falling through for technical objections by holding that these were terms substantially different.

"Submission" and "reference," we think, mean the same thing, and if the costs of proving the case before the arbitrators can properly be awarded as part of the costs of the reference, they could equally be awarded as part of the costs of the submission, and *vice versa*; and if this be so, as we think it is, then it cannot be material which word is used in the submission or in the award.

If the award were in this respect defective, however, it would still have been a question whether the legal objection of want of finality could properly be set up, as it has been here, by a plea, when the award and submission had been fully set out in the declaration. The defendant could in this case certainly have brought up the objection by demurrer to the declaration, and we think that was his proper course, though it must be admitted that on that point the law seems to be rather unsettled.

By pleading it as a defence, after the submission and award had been fully set out in the previous pleading, he tenders an issue in fact upon the sufficiency of the award on the face of it, when compared with the submission which had also been already set out.

Judgment for the plaintiff on demurrer.

SMITH V. R. AND G. NICHOLSON, EXECUTORS, AND ANNIE
NICHOLSON, EXECUTRIX OF WILLIAM NICHOLSON.

Promissory note—Set-off.

Action against executors on a note made by testator payable to S. or bearer, and by him transferred to plaintiff. *Plea*, that the note was transferred to the plaintiff after the death of testator, and that S., at the commencement of the suit, was and still is indebted to defendants as executors in an amount equal to the note, for, &c.

Held, on demurrer, plea bad.

ACTION against defendants as executors and executrix of William Nicholson, on a promissory note made by him payable to Samuel Smith, or bearer, and by Smith transferred to the plaintiff.

Plea.—That the said note was transferred and delivered to the said plaintiff after the death of the said William Nicholson, to wit, on, &c., and that the said Samuel Smith at the time of the commencement of this suit was, and still is, indebted to the defendants, as executors and executrix as aforesaid, in an amount equal to the said note, for goods sold and delivered by the said William Nicholson in his lifetime to the said Samuel Smith, at his request, and for goods sold and delivered by the said defendants since the death of the said William Nicholson to the said Samuel Smith at his request, the said Samuel Smith then being the holder of the said note, which amount the defendants claim should be set-off against the amount of the said note.

Demurrer, on the grounds that the plea shews no agreement that the debt due to the defendants should be set off, or that the note was fraudulently transferred to avoid the set-off, and said plea is not allowed by the statute in that behalf.

W. Eccles, for the demurrer, cited *Burrough v. Moss*, 10 B. & C. 558.

Lawder, contra.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff is entitled to judgment on this demurrer. *Burrough v. Moss* (10 B. & C. 558) is in point, and this plea attempts to carry the right of set-off to an extent that would be warranted by no authority. For all that appears the plaintiff may have taken this note for value long before it was due, and it could never in his hands be held liable to be cancelled or redeemed by a set-off of a debt due by the payee of the note, or by his estate, and a debt due wholly unconnected with any transaction about the note.

Judgment for plaintiff on demurrer.(a)

SCOTT V. THE TRUSTEES OF UNION SCHOOL SECTION No. 1,
IN BURGESS, AND No. 2, IN BATHURST.

School trustees—Execution against—Sale of school house.

Held, that land conveyed to school trustees for the purposes of a school it could not be sold under execution against them on a judgment obtained for the money due for building the school-house.

EJECTMENT for half an acre of land of the rear part of No. 12, in the 10th concession of Burgess.

At the trial at Perth, before *Richards*, J., a deed from John Allan to defendants, dated the 17th of June, 1856, was put in and the execution admitted.

This deed was made between the said John Allan of the first part, Ann Allan, his wife, of the second part, and the trustees of the united school sections No. 1, of the Township of Burgess north, and No. 2, of the Township of Bathurst, both in the County of Lanark and province aforesaid, of the third part; and by it, in consideration of 5s., the said John Allan conveyed to the said parties of the third part and their successors in office for ever, the land in question, "in trust for the use of a common school in and for the united

(a) See *Stein v. Yglesias*, 1 Cr. M. & R. 565; *Goodall v. Ray*, 4 Dowl. 76; *Whitehead v. Walker*, 9 M. & W. 506; *Byles on Bills*, 130.

school sections No. 1, of the Township of Burgess North, and No. 2, of the Township of Bathurst, both in the County of Lanark, and Province of Canada aforesaid. Provided always, and it is the true intent and meaning of these presents, and of the parties hereto, that if the said above described lands and premises shall at any time hereafter cease to be used for common school purposes for the space of three years at any one time, then and in that case the same shall immediately revert to the said party of the first part, his heirs and assigns, and he, she, or they shall and may enter in and upon, and the same shall and may occupy and enjoy, as fully to all intents and purposes as if these presents never had been made; the said trustees or their successors in office being allowed to remove any building or erections thereon before the expiration of said three years." Then followed the usual covenants for title, and bar of dower. A judgment in favour of the plaintiff against defendants, entered in the Common Pleas on the 15th of March, 1858, for £171 2s. 2d., was also admitted, and the issuing and return of execution against goods; and writs of *fi. fa.* and *ven. ex.* against lands were produced, and a deed from James Thompson, sheriff, to the plaintiff of the *locus in quo*, dated the 5th of September, 1859.

It was objected that the interest of defendants under the deed to them was not one that could be seized and sold under a *fi. fa.* against lands, and a verdict was taken for the plaintiff, subject to the opinion of the court on this point.

Richards, Q. C., for the plaintiff.

Deacon, contra, cited *Simpson v. Carr*, 5 U. C. R. 326; *Doe Hull v. Greenhill*, 4 B. & Al. 684; *Roe v. Pegg*, 4 Dougl. 309; *Scott v. Scholey*, 8 East 467; *Baxter v. Brown*, 7 M. & Gr. 198; *Hill on Trustees*, 239; *Grant on Corporations*, 511, 512.

The statutes bearing upon the question are referred to in the judgments.

ROBINSON, C. J.—The plaintiff having a claim upon the defendants, the school trustees, for building a school

house for their union section, obtained against them in the Court of Common Pleas an execution thereupon for £171 2s. 2d., and taking out a writ against the lands of the trustees of the said school section had the site of their school house and the house itself sold at sheriff's sale, and the plaintiff in the action bought it at the sale for £50, and on the 5th day of September, 1859, the sheriff made a deed to him of the land.

The judgment and execution were against the trustees by their corporate name.

A copy of a deed dated the 17th of June, 1856, by which John Allan and his wife conveyed the site of the school house to the trustees of the united school section, "*and to their successors in office,*" is given in the case stated, from which it will be seen that the trustees (that is, for the time being) were to hold the land in trust for the use of a common school in and for the united school sections.

The first question is, whether the land was subject to be sold, as it was, to satisfy Scott's debt, due to him by the trustees for building the school house, as it is admitted by the parties? I think it was not so liable.

The school trustees are a board for taking care of and managing (among other duties) the school house in which the common schools are to be kept for the benefit of the inhabitants. They are in the light, I think, of trustees for the inhabitants as regards the school houses and the sites on which they are built. If they were individuals against whom a judgment had been entered for a debt due by them jointly, any property which they held as trustees for others could not be sold to satisfy the judgment.

The case was argued as if the question were rather whether the property could not be sold under the 10th section of the Statute of Frauds, 29 Car. II., ch. 3, but that is a provision applying only to judgments against persons *for whom* lands, &c., are held by others in trust, that is, upon a naked trust for their benefit, when no special confidence is reposed in the trustee, but he is merely to pay over the rents and profits to the *cestui que trust* against whom the judgment has been rendered. This is clearly no

case of that kind. The inhabitants of the school division are the *cestuis que trust* in the case. The defendants are not in that position.

But it is argued, and not unreasonably, that the debt in this case being due to the plaintiff for building the school house which he desires should be seized in execution, it is not unjust that he should be able to seize the building in execution to pay the debt. If we look, however, to the extent to which such a claim might be pushed in similar cases, we should see the embarrassment that would ensue.

In this case, to say nothing of the site, the school house itself cost £150 or more, and the whole has been bid off by the plaintiff for £50. The school acts appear to have made special provision for raising by assessment the moneys necessary for *building school houses*, as well as for defraying other school charges, and in some cases the trustees are made personally liable, so that we cannot conclude that there is no remedy in the power of the plaintiff but seizing and selling a property held in trust for the inhabitants of the section, and given by the donor upon the express condition that it should never be used for other than school purposes.

I refer to the statutes 13 & 14 Vic., ch. 48, sec. 12, sub-secs. 3, 4, 7, 9, 16, and sec. 18, sub-sec. 1; also, to 16 Vic., ch. 185, secs. 6 & 17.

In my opinion a verdict should be entered for the defendants.

BURNS, J.—The question presented by this case is one of great public importance, for if the school houses and lands thereunto attached throughout the province are liable to be sold upon execution at the suit of any one who has obtained a judgment against the corporation for a debt due, the same principle should hold good against the corporations of counties and cities, and we should have creditors claiming to sell the public court houses and gaols upon writs of execution. I have been unable to find any direct authority upon the subject either one way or the other in England, but I think the history of the proceedings of Mr. Robert Hennings Parr against the Corporation of Poole does throw

some light upon the question. Upon the passing of the statute 5 & 6 W., IV., ch. 76, the Municipal Corporation Act, Mr. Parr was dismissed from his office of town clerk of the town and county of Poole. He claimed compensation, and the corporation awarded him £4,500, for which the corporation gave a bond payable by instalments out of the funds of the borough. The payments not being all made he brought an action against the corporation and recovered judgment by default, and upon the judgment he caused an *elegit* to be extended, and thereupon brought an action of ejectment to recover a piece of land used as a meat market, together with the Guild-hall and other erections and buildings thereon, then used and occupied by the corporation for the public purposes of the town. Previous to this some of the rate-payers filed an information to restrain the town council from paying Mr. Parr; and to test the legality of imposing a rate for the purpose; and Mr. Parr also applied to the court of Queen's Bench for a mandamus against the mayor, aldermen and councillors of the town, to compel them to impose a rate to pay the demand. In the ejectment a rule for judgment was obtained unless the persons in possession should appear and plead. On behalf of the mayor, aldermen and councillors an application was made to the court to be permitted to defend without confessing possession, and the ground of asking to defend was that the Guild-hall was the only place in which they had been accustomed to transact the public business, and that the sessions for the borough were held in the Guild-hall, and the same was used by the justices for public purposes only. Lord *Denman*, in giving judgment upon the application, said the court was not called upon in that stage of the proceedings to decide whether their property, applicable to public purposes only, was liable to be taken in execution; but he said the court wished to be understood as not giving any countenance to the supposition that corporate property, though applied to public purposes, was protected from the lawful claims of persons having demands upon the corporation. See *The Attorney-General v. Corporation of Poole* (2 Keen 190, 4 M. & Cr. 17), *Regina v. Ledgard* (1 Q. B. 616), *Parr v. The*

Attorney-General (8 Cl. & F. 409 and 6 Jur. 245), *Doe Parr v. Roe*, (1 Q. B. 700).

It will be observed in *Parr's* case that there was other property, such as the meat-market, and other erections and buildings besides the Guild-hall, which latter was used for public purposes and the courts, for which the action was brought, and the defendants sought to defend the action inasmuch as the Guild-hall was used for those purposes.

In the case before us it is the school house and the land belonging to it used for the purposes of the school which has been sold, and we are called upon to say whether that can legally be done. The statute 13 & 14 Vic., ch. 48, sec. 12, sub-sec. 3, enables the trustees to acquire and hold as a corporation, by any title whatsoever, any land for common school purposes until the power should be taken away or modified, and to apply the same according to the terms of acquiring or receiving them. By the terms of the conveyance to the trustees of the land in question it was to be held in trust for the use of a common school for the united sections; provided, and it was, as the instrument expresses it, the true intent and meaning of the deed of conveyance, that if the premises should at any time cease to be used for common school purposes for the space of three years, then the said premises should revert to the grantor. Now, if the plaintiff can be at liberty to sell the premises upon his judgment and execution, and buy it, and then can dispossess the trustees, so that the same can no longer be used for common school purposes, the plaintiff's act can neither be beneficial to himself nor the corporation. But independent of the terms upon which this particular school house and premises are held, I think it is against public policy to permit the public property of this description to be sold upon execution.

By the 7th sub-section of the section of the act quoted, it is the duty of the trustees to provide for the salaries of teachers and all other expenses of the school in such manner as the majority of freeholders or householders of the section may desire; and if the sums be insufficient to defray all the expenses, the trustees shall have authority to assess and cause to be collected any additional rate in order to pay the balance.

It is not for us in this action to point out to the plaintiff

what remedy he may have in order to procure payment of the debt for which he recovered judgment against the corporation, or indeed to say whether he has any remedy. It is admitted that the debt due the plaintiff was for building the school house, and in such case we see that for the erection of the school house, the 6th section of 16 Vic., ch. 185, enables the trustees to assess the section for that purpose. The 16th sub-section of section 12 of 13 & 14 Vic., ch. 48, enacts that in case any of the trustees shall wilfully neglect or refuse to exercise such powers as are vested in them for the fulfilment of any contract or agreement made by them, they shall be personally responsible for the fulfilment of such contract or agreement.

Looking at the whole of the school acts, and the objects and intents for which the same have been enacted, and the duties imposed upon the trustees with regard to the fulfilling of contracts made by them, and the power given them enabling them to do so, the liability and responsibility cast upon them individually if they neglect to perform their duty, I think the effect is to create these corporations for public beneficial and charitable purposes, and that the property should be held and administered for the ends and purposes for which it was given and held.

It is sufficient to hold, in this action of ejectment, to recover the school house, that it is contrary to public policy to hold that property which is held for such purposes as this can be sold upon execution against the corporation. The corporation possibly may hold property the uses of which would be for the public, or the profits of which might be appropriated to the maintenance of the school, and which it would be right to hold might be sold upon execution, but that is different from selling the school house itself, which is as much in daily use for the children of the section as the court house is for the holding of the courts, or the prisons for confining prisoners of the counties, and I apprehend it could not possibly be held that these latter are liable to be sold upon execution.

I think the *postea* should therefore be given to the defendants.

McLEAN, J., concurred.

Judgment for defendants.

BROWN ET AL. V. BRUCE.

Will—Disposing power—Conflicting evidence—New trial refused.

The court in this case, though the weight of evidence seemed the other way, refused to set aside a verdict upholding a will made by testator in his last illness, which was disputed on the ground that he was not competent at the time to exercise a disposing power, though his strength of mind when in health was not doubted.

Harwood v. Baker, 3 Moore P. C. C. 282, commented on.

EJECTMENT for the west half of broken lot 18 in the 7th concession of Kitley.

At the trial, at Brockville, before *Richards*, J., it appeared that the plaintiffs Mary Brown, Eliza Bruce, and Anne Weatherhead were children of one Robert Bruce, deceased, and the defendant was a son of the same Robert Bruce.

The defendant in his notice served upon the plaintiffs, claimed under the will of Robert Bruce, deceased.

The defendant put in a will purporting to be made by his father on the 30th of October, 1856, whereby he devised to his wife the land in question, (being the farm on which he lived,) to hold during her life, and after her death to go to his son Robert, (the defendant,) his heirs and assigns for ever. He gave also to his wife all his stock, and crop, and household furniture, during her life, to and for her use and support, and if any part should remain at her decease, then he gave and devised it to his son Robert. And he made his wife executrix, and his son Robert, and James Edgar, executors of his will.

He had no other children but the three female plaintiffs and the defendant. The daughters were all married. The son lived near the testator, on a farm of his own. The testator's widow died in February, 1858.

Edgar, the executor, was the father of the defendant's wife. He drew the will, which was witnessed by Seth S. Connell, the doctor who attended the testator in his last illness, by Edgar, the executor, who prepared the will, and by James Bruce, a son of the defendant, a lad then about sixteen years of age.

The will was registered on the 5th of November, 1856. It was properly attested by the three witnesses, and it was

proved that the will was read over to the testator by Edgar an hour or so before it was executed. The testator did not write his name, but made his mark.

He was 68 years old when the will was made, and was suffering from a disease of the bladder. He died in about twenty-four hours after the will was executed. When in health he could write a fair hand.

The three subscribing witnesses were examined at the trial, and two other witnesses, who were about the deceased in his last illness, one of them a neighbour, who was with him the night before he died, after the will was executed.

The evidence tended to shew that in the opinion of two of the subscribing witnesses it was extremely doubtful whether when the testator executed the will he knew what he was signing, though from facts stated by them and by the other subscribing witnesses, and two other witnesses, it would seem probable that he could understand the object of the will to be to give the land to his son after his wife's death. There was evidence that the disposition which the will made of his farm was that which he had before said he intended to make. The deceased was not described as being ordinarily a man of weak intellect, or infirm mind; the doubt was whether in this his last illness, and within a few hours of his death, he did in fact know what he was executing, and whether he had sufficient understanding to exercise a disposing will. The evidence seemed to preponderate against the will, and so the learned judge thought, for he directed the jury that after the evidence given by the two subscribing witnesses, Connell and Edgar, it would in his opinion be very unsatisfactory to decide on the other testimony that the testator was competent at the time of the execution of the will to do such an act. The jury nevertheless found for the defendant. There was no attempt to impeach the character of any of the witnesses. The case went to the jury wholly on the testimony called on the part of the defendant.

Albert Richards moved for a new trial on the law and evidence. He cited *Sutton v. Sadler*, 3 C. B. N. S. 87.

Steele shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We think there is no ground for complaining that the jury was misdirected in this case. In the course of his remarks to the jury, the learned judge may have said something to this effect—that when the execution of a will is proved, it will be assumed, where there is no evidence to the contrary, that the testator had a sound disposing mind, and was legally capable of making a will; and if he did say so it was rightly said, for happily sanity is the rule and insanity the exception, and there must be some evidence to shew the case an exception to the general rule. But the parties were not before the jury under such circumstances.

We have considered the case of *Harwood v. Baker* (3 Moore P. C., C. 282.) It is reported at great length, and is a very interesting and instructive case. There was stronger evidence given there in favour of the testator's competency to make a will than was given in the present case, and yet the prerogative court had refused to grant probate. This will being called in question in a matter regarding real estate, it has necessarily been submitted to a jury, who have upheld the will; and we have not to determine whether we should have granted probate under the circumstances as they appeared before the jury, but whether we should hold the jury to have done wrong in giving the verdict which they did, and in the exercise of our discretion set their verdict aside as being contrary to evidence.

There is a good deal in the language of the judgment in the case referred to, which was determined by the judicial committee of the privy council, which would seem to make it almost imperative upon us to set aside this verdict; but I think I am not going too far when I say that there are passages in the admirably clear and very able judgment delivered on that occasion by Mr. Justice Erskine in the name of the court, which it would be difficult to reconcile with some judgments which have been given, both in courts of law and equity, as to the state of mind which it is necessary a testator should be in to enable him to make any disposition of his property, even the most plain and simple. We can account for this difference by observing how in that case the

court were struggling to prevent the success of what they doubtless felt to have been a bold and artful scheme to exclude the testator's nearest relations from sharing in a large property which he was leaving, and to procure a will to be made in favour of his wife that should extend to all he possessed, although he had given the plainest proofs, just before the sudden illness which terminated fatally, that he contemplated making a very different disposition of his property, and had even had a will prepared, which was ready for execution, and which would have provided for other objects of his bounty as well as for his wife.

The court had too much reason to fear that the will of which probate had been refused had been unfairly procured from the testator in his last illness, without attempting to recall to his mind what he had before resolved upon doing, and they thought they saw that measures had been resorted to which he had not mind or will enough left to detect or to oppose, and a will thereby obtained which he had given the strongest reason to believe he would not have made if it had been proposed to him when he was able to weigh and deliberate upon what he was doing. Here the circumstances are so far different that the testator had given no evidence of having intended to make any other disposition of his property, and the disposition which the will did make was not only such as he must have been capable of comprehending, if he could comprehend any thing, but such also as he might reasonably desire to make under the circumstances, providing what could not be more than an adequate maintenance for his widow while she lived, and giving his small farm to his only son after her death. There was evidence tending to shew that he understood and was satisfied with this disposition which he had made, and that he comprehended it at the time; and however doubtful we may feel as to the state of his mind, the defendants who claimed under the will produced witnesses, some of whom attested the execution and others did not, and all of whom were closely questioned as to the state of mind of the testator, for it was well understood on both sides that the case was to be contested on that point; and at the close the

jury were plainly told that it was for them to determine upon the evidence, upon which there seems little reason to suppose that any new light can be thrown upon another trial. The plaintiffs have no reason to complain of the learned judge's charge, for it was strongly in their favour. Still the jury found the verdict for the defendant, thereby affirming that they were satisfied that the testator knew sufficiently well what disposition he was making of his property by the will, though there is no doubt that his mind and memory were considerably affected by the disease under which he was sinking.

Whether we shall disturb their finding as being contrary to evidence is now the question. We are not of opinion that we should do so, though the evidence is certainly strong to lead to the opposite conclusion from that to which the jury came. The testator was not a man so advanced in age as to have his mind feeble from that cause. He was not in his dotage, neither was he a man naturally of weak intellect. He made his will in his last illness, when his memory was clouded and his mind impaired and disturbed by a fatal malady under which he was sinking.

We must be careful not to exact too much under such circumstances, or in many cases of deaths from painful accidents, or from illness becoming suddenly fatal, great injury will be occasioned to families if courts and juries should deny the validity of a will necessarily made in moments of distress, and of bodily and mental disturbance, when there is still, however, enough of understanding and of will left to enable the sufferer to determine all that is material, though he might be unable to collect the powers of his mind sufficiently to dictate or to comprehend a very complicated family arrangement, and to weigh claims and circumstances as well as he could have done a day or a week before.

The testator here had but a single property of one hundred acres of land; he had three married daughters, who it is said and not denied were comfortably provided for; and besides these he had but one son, the defendant. If he had set about making his will before he was so near his end, he might or he might not have charged this small real property

with some payment to his daughters, but it is not likely that he would have divided it into four parts for his four children, which would have rendered the portion of each of little use as a support. Nor is it likely that he would have preferred to make no disposition of it, but leave it to be sold, and the proceeds to be divided among the four, which would have been the probable consequence, under our late statutes, of his dying intestate.

The disposition that was made was natural and rational, leaving his small farm to his widow for her life, and after her death to his son. It is what we have many opportunities of judging would most probably be done by a testator under such circumstances. If, therefore, the testator had sufficient understanding, when it was distinctly put to him, to declare that to be his will, if he had given evidence before that he contemplated such a disposition, and if he spoke afterwards of it in such a manner as to shew that he could and did comprehend what disposition he had made, we think the jury were warranted in believing that he had understanding enough for the purpose for which he was called upon to exert it. It was for the jury, after duly weighing all the evidence, to find whether he could and did comprehend the very simple provision which his will made, or whether he was so destitute of understanding as to be unequal even to that.

If they had found against the will, they had very strong evidence to support such a conclusion, but we cannot say they were wrong in believing from other parts of the testimony that he knew that he was giving the farm to his wife for life, and to his son afterwards, and that is all the will professed to do, except a similar disposition as to his furniture and stock at the time. We do not think that we should reverse the finding of the jury, whose province it was to estimate the credibility of witnesses, especially too as the plaintiffs seem to have been content to let the will have effect during the lifetime of the testator's widow, and so far to have submitted to the disposition which the testator made by it.

Rule discharged.

HURD V. LEVIS.

Will—Construction—Estate for life or in fee.

Under the following devise, proved in 1830: "And as touching such worldly estate as wherewith it has pleased God to bless me in this life, I give, demise, and dispose of the same in the following manner and form: First, I give and bequeath to Mary, my dearly beloved wife, (who I likewise constitute, make and ordain sole executrix of this my last will and testament,) all and singular my lands, messuages and tenements, together with my ready cash, household goods, debts and moveable effects, by her freely to be possessed and enjoyed."

Held, that the widow took a fee in the land.

This was an action brought by the plaintiff, against the defendant, for the recovery of the front one hundred and five acres of lot number twenty-one, in the fifth concession of the township of Augusta, in the county of Grenville, and by order of a judge, according to the Common Law Procedure Act, 1856, the following case was stated for the opinion of the court, without any pleadings:—

CASE.

Jabish Hurd, in his lifetime of Augusta aforesaid, yeoman, died seized of the said lands, having first, and while so seized, made his last will and testament, duly attested to pass real estate. Said will is dated on the 24th of February, 1821, and probate thereof granted to Mary Hurd, widow of the said Jabish Hurd, on the 12th of June, 1830, and the said Jabish Hurd died between these dates.

By said last will and testament the said Jabish Hurd did devise and bequeath as follows:

"And as touching such worldly estate as wherewith it hath pleased God to bless me in this life, I give, demise, and dispose of the same in the following manner and form: First, I give and bequeath to Mary, my dearly beloved wife, (who I likewise constitute, make, and ordain sole executrix of this my last will and testament,) all and singular my lands, messuages and tenements, together with my ready cash, household goods, debts and moveable effects, by her freely to be possessed and enjoyed; and I do hereby utterly disallow, revoke and disannul all and every other former testaments, wills, legacies and bequests by me in any wise before named, willed and bequeathed, ratifying and confirming this and no other to be my last will and testament."

No other devise, bequest, or disposition of property, real or personal, is contained or expressed in said will.

After the decease of the said Jabish Hurd, the said Mary Hurd entered into possession of the said lands under the said will, and while possessed thereof, on the 12th of April, 1848, by deed of bargain and sale duly executed, and bearing date the day and year last aforesaid, as widow and devisee of the said Jabish Hurd, deceased, did, for the consideration therein mentioned, by virtue and authority of the said last will and testament of the said Jabish Hurd, deceased, convey the said lands in fee to William Levis, since deceased, who died before the commencement of this suit.

For the purposes of this suit, it is admitted that the defendant, Abigail Levis, has all the interest in said lands which was of or belonged to the said William Levis at his death; and that the said Mary Hurd died before the commencement of this suit, and that the plaintiff, Stephen Hurd, is the sole heir-at-law of the said deceased Jabish Hurd.

The question for the opinion of the court is, whether under the said will the said Mary Hurd took a fee in the lands in question, or had the power of conveyance thereof in fee.

If the court shall be of opinion in the negative, then judgment shall be entered up for the plaintiff for the recovery of the said lands and costs of suit.

If the court shall be of opinion in the affirmative, then judgment, with costs of defence, shall be entered up for the defendant.

Eccles, Q. C., for the plaintiff, cited *Smith v. Holmes*, 14 U. C. R. 572; *Goodright dem. Drewry v. Barron*, 11 East 220; *Doe dem. Ashby v. Baines*, 2 Cr. M. & R. 23; *Bromitt v. Moor*, 9 Hare 374; *Baby v. Baby*, 1 U. C. R. 54.

Steele contra, cited *Doe dem. Booley et al. v. Roberts*, 11 A. & E. 1000.

ROBINSON, C. J.—In *Doe dem. Penwarden v. Gilbert*, (3 B. & B. 88,) *Dallas*, C. J., observed, with respect to questions upon the construction of wills, such as that raised in this case, “Every case of this sort depends on its own peculiar circumstances, for in every case the question is one of construction to be made on the whole of the will; every case, therefore, is individual.”

Looking at this will, I think we may say without doubt that there can be but one opinion as to what the testator

intended. The will discloses but one object of his bounty. There are no dispositions made to several persons in different forms of words and with different objects ; the little that is said is said plainly, and with a single purpose in view. My opinion is, that the testator meant by his will to give his wife his whole estate in his land as well as in his goods, and that we may give that effect to the will, though it is wanting in words of inheritance.

He begins by announcing an intention to dispose of such *estate* as God has blessed him with in this life ; that is, of all such estate, real as well as personal.

That would not be of itself decisive, for reasons that have been given in so many cases that they need not now be repeated, but those are words not to be discarded, and when, as in this will, nothing comes between them and the disposition made of the real estate, they may have the more weight given to them.

In one sentence the testator declares that he is about to dispose of his worldly estate, and gives to his wife his lands, messuages, and tenements, together with his ready cash, household goods, debts and moveable effects, adding to this gift of the whole, "*by her freely to be possessed and enjoyed.*"

It is the same as if he had said, "with respect to my estate real and personal, I give all to my wife to do with as she pleases."

There are cases in which wills a good deal resembling this have been held not to give a fee, but in most if not all of of them there was some point of difference, which seemed to compel the court to adopt reluctantly a different construction. In the case cited by Mr. Steele, of Doe dem. Booley et al. v. Roberts, (11 A. & E. 1000,) the will was like this, short and simple, and so much like the will before us as to leave no sensible ground of distinction, for the testator in that will said : "I give and bequeath to Mary, my wife, all my lands, messuages and tenements, by her freely to be possessed and enjoyed, with all my property whatsoever." The similarity of the two wills is remarkable. The court of Queen's Bench in that case, having had the case some months under consideration, held that the widow took the

fee, and they grounded their decision on assuming that the word "property" as used there, might be fairly taken to mean any *personalty* that the testator might die possessed of, and it shewed, they said, that he meant to give all in the same manner ; that is, houses, lands, and goods, in perpetuity. Now, in this will, cash, goods, &c., are expressly given in the same sentence with the lands, and we have no need to resort to suppositions or inferences in that respect. We cannot doubt for a moment that the court which determined the case referred to would without hesitation have held that the fee passed under this will. Lord *Denman* concludes this case by saying that, in deciding as they did, (upon the meaning they gave to the word property,) their judgment left all the cases untouched. I confess I cannot altogether accede to that, for it is not easy to reconcile that decision with that of *Bromitt v. Moore*, (9 Hare 378,) which, however, was after, which did not advert to the case of *Doe Booley v. Roberts*, and is not of equal authority, being the decision of a single judge, and not on the principal point in the case. But I gladly avail myself of the authority of the Court of Queen's Bench in the case referred to, supporting, as it does, what was evidently intended to be the effect of this will, and considering how hardly a contrary decision would bear, when in this case the widow, assuming that she had the whole interest, sold the land eleven years ago to a purchaser, who has probably entered upon it and improved it.

McLEAN, J.—It appears that the devisee, Mary Hurd, entered under the will into possession of the lands after the death of her husband, and remained in possession for a period of at least eighteen years: that is, from the date of the probate in 1830, till she sold to Levis in April, 1848. There is no doubt that under the will she was entitled to a life estate, and the plaintiff, as heir-at-law, could not assert any claim as such till after her death. In construing the will, it is evident that the testator, Jabish Hurd, did not intend to die intestate, or to make a temporary disposition of any of his estate. He professes to give, demise and dispose of all the *worldly estate* wherewith it had pleased God to bless

him, and by way of so giving and disposing of his "worldly estate," he gives and bequeaths to his wife, and makes her sole executrix, all his lands, messuages and tenements, together with his ready cash, household goods and moveable effects, *by her freely to be possessed and enjoyed*. The whole estate of which the testator was possessed is thus given to his wife, and she became entitled on the death of her husband to *the free enjoyment* of all the lands, messuages and tenements, *as well* as the personal property, and to the same extent. The words "freely to be possessed and enjoyed," apply to the whole estate, not more to the goods than to the lands, and, as it appears to me, were intended to give, and did give to the devisee an absolute power over both. It could scarcely be said that the lands could be *freely* possessed and enjoyed by the widow if not subject to her disposal, inasmuch as if after her death they must descend to the heir-at-law of her husband, she might be restrained from expending means which might be essential to their improvement, and thus materially interfere with the free enjoyment which her husband intended her to have.

The terms of the will in this case are singularly like those in the will which formed the subject of discussion in the case of Doe Booley v. Roberts, (11 A. & E. 1000,) in which case the words of the will were, "I give and bequeath to Mary, my wife, all my lands, messuages and tenements, by her freely to be possessed and enjoyed, with all my *property* whatsoever." In that case, as stated by *Coleridge, J.*, in the course of the argument, the chief difficulty was that no word was found in the will for personalty besides "property." Had that will given, as this does, to the wife of the testator, "his ready cash, household goods and moveable effects," and shewn as clearly that the same interest was intended to be left to the widow in lands and goods, the difficulty stated could not have been felt. In the judgment in that case Lord *Denman* said, in reference to the word "property," that the testator "plainly thought that he might die possessed of personalty; and, in case he should, *meant to give* it exactly in the same manner, and for the same interest, as the lands and houses. This appears to

the court a good indication that he gave both in perpetuity. The widow, therefore, had an estate in fee." In this case the testator shews by his will that he had personal property, and he gave it and his real estate together, to be freely enjoyed in the same manner and on the same tenure.

In the case of *Bromitt v. Moor*, (12 Eng. Rep. 241, 9 Hare 374,) the words of the will are still more remarkable in their resemblance to the will in the present case, than those in the will in the case of *Doe Booley v. Roberts*. The words in that case are, "First, I give and bequeath to my son William Bromitt, and my son George Bromitt, (and likewise constitute and ordain them my sole executors of this my last will and testament,) *all and singular* my lands, messuages and tenements, with all my goods and chattels, by them freely to be possessed and enjoyed." In that case the Vice-Chancellor, in giving judgment, stated that "the construction of the will must be governed by the cases of *Goodright v. Barron*, (11 East 220,) and *Doe v. Baines*, (2 Cr. M. & R. 23,) unless those cases were overruled by *Doe v. Haslewood*, (6 A. & E. 167,) but," he adds, "the latter case was determined upon the effect of the peculiar expression by which the testator appointed the person named in the will to be sole executrix of his freehold house, which the court thought could only be satisfied by holding that the fee passed. By the gift in the present will of the 'lands, messuages and tenements,' nothing more than the life estate passed."

The attention of the Vice-Chancellor does not seem to have been directed to the case of *Doe Booley v. Roberts*, which much more closely resembled the case before him than either of the cases which he refers to as governing the construction of the will. Had that been done, perhaps a different construction might have been adopted. Be that as it may, it appears to me that the judgment in the case of *Doe Booley v. Roberts* is that which gives the more correct construction to the terms of the will, and that it is more to be relied upon than the sole judgment of the Vice-Chancellor, who may have been in ignorance of the former decision on words the same in all respects as in the case before him.

In the case of *Doe Ashby et al. v. Baines* (2 C. M. & R.

23,) one of those which guided the Vice-Chancellor in his construction of the will, though the words are in some respects similar to the words in the present will, and in the will in the case of *Bromitt v. Moor*, there is a very important difference, on which, in my judgment, the distinction rests. In that case the testator gave to his daughter, whom he made his sole executrix, all and singular his lands, tenements and messuages, by her freely to be possessed and enjoyed. He does not give any goods and chattels in connexion with the lands, and therefore no inference could arise that the testator could have intended to give any more than a life estate. That case, therefore, is so different that it scarcely forms a sufficient ground for a decision adverse to that of the court of Queen's Bench, on a devise as nearly similar as possible.

The same may be said of the case of *Goodright ex dem. Drewry v. Barron*, (11 East 220,) in which the devise to his widow of all and singular the testator's lands, messuages and tenements, by her freely to be possessed and enjoyed, is not accompanied or connected with a bequest of any personal property to be held with the lands, messuages and tenements. It was a mere naked bequest of the lands, without any thing to lead to a conclusion that it was the intention of the testator to give an estate in fee.

These cases, on which the construction of the will in the case of *Bromitt v. Moor* was decided, being on the construction of wills different in an important particular from the will in that case, I think leave the Vice-Chancellor's judgment unsupported by authority, and therefore it ought not to be allowed to shake the authority of the case of *Doe Booley et al. v. Roberts*.

On these grounds, therefore, I have come to the conclusion that the widow of *Jabish Hurd* took an estate in fee in the lands devised to her, and that the defendant is entitled to judgment.

BURNS, J., concurred.

Judgment for defendant.

REGINA V. GEORGE BYRON LYON FELLOWES, GEORGE MOSELY CRYSLER, JOHN SAXON CASSELMAN, AND MARTIN CASSELMAN.

Indictment for conspiracy and fraud at election—Right of challenge—Affidavits of jurors—Evidence of accomplice—Application for new trial—Evidence of conspiracy.

Upon an indictment for conspiracy to procure by fraud the return of one F. as a member for the Legislative Assembly.

- Held*, 1.—That the Crown was entitled to challenge any of the jurors peremptorily, without assigning a cause, until the panel had been exhausted.
- 2.—That affidavits made by some of the jurors that the jury were not unanimous, but believed that the verdict of the majority was sufficient, could not be received as ground for a new trial.
- 3.—*Semble*, that a conviction upon the evidence of an accomplice not corroborated by other testimony is not illegal, but *held* that in this case such evidence was clearly confirmed, and that the verdict against all the defendants was warranted.
- 4.—Where several defendants have been convicted, a new trial if granted must be to all.
- 5.—It is clearly unnecessary to prove that all the defendants, or any two of them, actually met together and concerted the proceeding carried out; it is sufficient if the jury are satisfied from their conduct, and from all the circumstances, that they were acting in concert.

These four defendants were tried at the last assizes, held at L'Original, before *Richards, J.*, upon an information filed by the Attorney-General, which charged them with having conspired together to procure by fraud the defendant George B. L. Fellowes to be illegally returned at an election of a member to represent the county of Russell in the Legislative Assembly, which election was holden in the said county, on the 26th and 28th days of December, 1857.

The information contained three counts. In the first two counts the particular means were set out by which the defendants conspired and combined together to effect their purpose, and various overt acts were stated to have been done by some or more of the defendants in pursuance of their illegal conspiracy. The third count charged the conspiracy in a more general form.

One of the polling places for the election was in the township of Cambridge. The defendant George M. Crysler was deputy-returning-officer at that polling place, acting under a commission to him as township clerk for Cambridge from James Keays, Esquire, the returning officer for that county.

John S. Casselman was poll clerk serving under him during the polling on the 26th and 28th of December; Mar-

tin Casselman, another defendant, was attending during the election, or a part of it, in the interest of the defendant Fellowes, and being reeve of the township and a justice of the peace, he administered to the said deputy-returning officer and poll clerk the oaths which it was their duty to take after the closing of the poll, of the due recording of the votes and the due keeping of the poll book.

The substance of the charge in the information, as set forth in the different counts, was that on the 28th of December, the second day of polling, three hundred and forty-seven names were entered on the poll book as of persons who had on that day given their votes in the ordinary manner for the defendant Fellowes, when no such votes were in fact given, as the defendants well knew: that the names so entered were the names of fictitious persons, or of persons who, if they existed in this or any other country, had not voted or appeared at the poll. The contrivance by which this was alleged to have been effected was set out in the information, and it was averred that in consequence of the fraud thus practised the defendant Fellowes had in that township a very large apparent majority over the opposing candidate, which on the making up the returns collected from the several polling places gave him a majority in the county, and he was in consequence returned as duly elected.

The defendants pleaded not guilty, and upon the trial a general verdict of guilty was given against all.

The information having been filed in this court, *Richards*, Q.C., on the part of the defendants, moved within the first four days of this term for a rule to shew cause why a new trial should not be granted upon certain legal exceptions, and upon the general insufficiency of the evidence to support the indictment.

ROBINSON, C. J., delivered the judgment of the court.

With regard to the objection that the Crown had no right to challenge any of the jurors peremptorily, or without assigning a cause for the challenge, the judgment of the Court of Common Pleas in the case of the Queen v. Benjamin

(4 C. P. 179,) leaves no room for doubt upon it. In consequence of some difference of opinion which had prevailed upon the proper construction to be given to the 59th section of our Jury Act, 13 & 14 Vic., ch. 55, sec. 59, in respect to the right of the Crown to challenge jurors without assigning a cause at the time of the challenge, it was thought proper to remove all doubt by adopting in the Jury Act 16 Vic., ch. 120, a provision (7th clause) which should make our law on that point the same as exists in England. It was upon that statute that the decision in the *Queen v. Benjamin* took place, and in our subsequent statute, 22 Vic., ch. 100, sec. 99, consolidating the Jury Acts, that enactment respecting the right of challenge by the Crown was preserved; and we have no doubt but we must give to the 99th clause the same construction that is given to the similar enactment in England, under which the practice is, as it has indeed been from a very early period, that in trials for misdemeanors, as well as for felonies, the cause of challenge on the part of the Crown need not be assigned until the panel is gone through.

With regard to affidavits which have been made by some of the jurors who tried the case, that the jury were not in fact unanimous, but the belief among them was that unanimity was not necessary, and that a verdict could be given according to the opinion of the major part of them, we cannot receive and act upon such affidavits. The jury must be assumed to know the law in so cardinal a point of their duty, and we are clear that we ought not to set aside a verdict, either in a civil or criminal case, upon any affidavits of individual jurors respecting their method of coming to a conclusion, or the grounds on which they formed it. If it were shewn that upon their delivering their verdict in open court any thing was openly said by them which could give the court to understand that they were not all assenting to that verdict, and nevertheless, by some error or misapprehension, it was received as their unanimous verdict, we could, and ought to have interfered, we think, on such a ground. But that could hardly occur, for upon any intimation of that kind the jury would have been requested to retire and to endeavour to concur in a verdict of conviction or acquittal.

It remains then to consider the case upon its merits. The application for a new trial is not founded on our recent statute, 20 Vic., ch. 61, which enables the superior courts to grant a new trial in criminal cases tried at the assizes, but the defendants have moved for a new trial at common law, the information having been tried at *nisi prius* upon a record from this court. There is no doubt as to the power to grant a new trial to the defendants in any case of misdemeanor coming as this does before us, but we should only grant it in advancement of justice and upon proper grounds.

It has been urged by the defendants' counsel, who argued ably in support of the application, that a conviction could not legally take place upon the unsupported testimony of Bedell, who, according to his own account of the matter, was an accomplice in the fraud. If his evidence had been wholly without corroboration, there have been decisions in England to that effect, and eminent judges have in many cases directed juries, that where there is no evidence in support of the charge, and nothing to connect the defendant with the offence except the evidence of an accomplice, they ought not to convict. Other judges not less eminent have ruled differently, and though in such cases as we are now referring to they usually caution the jury against the danger of acting upon the evidence of an accomplice if it be wholly uncorroborated, yet they do not hold that a conviction upon such evidence would be illegal. The prevailing doctrine is, that as the witness is clearly admissible, and would equally be so if he had himself been tried and convicted, and as neither statute nor any principle of the common law requires the testimony of a second witness, except in cases of treason and perjury, it must be left to the jury, as in other cases, to estimate the weight of such evidence according to their opinion of the motives, character and credibility of the witness, and of the probable nature of his statement; and that those cases, as in others where the testimony given is in itself legal, and supports the charge, if it has had the effect of convincing them without doubt of the guilt of the accused, they are at liberty to act upon their conviction.

But it is unnecessary to say more on this point, or to refer to cases in England and in this country in which courts have so decided, for this is not a case of that kind. It can by no means be held by us that the evidence of Bedell, the accomplice, was uncorroborated; on the contrary, in many, if not all the essential particulars, it is confirmed by evidence from other sources. Where an accomplice is wholly uncorroborated, not only as regards the connexion of the person accused with the supposed crime, but even as regards the commission of any such crime by any person, the whole may be an invention of his own, prompted by malice or some interested motive, but it is not so as regards the matter charged in this information. That there was a gross fraud practised, and successfully practised, as regards the election in Cambridge, is manifest, and cannot in truth be said to be denied. That township was but very thinly settled, there being not more than seventy or eighty heads of families in it. The election was holden in December, when travelling is in general inconvenient and unpleasant, and it was not likely that there would be any unusual number of out-voters, if under any circumstances many could be expected. In the first day's polling only about 31 or 32 votes were taken, and on the next day, up to an early hour in the afternoon, about fifteen votes. In all, it seems that only about five of these voted during the two days for the other candidate, Mr. Loux. The others voted for the defendant Mr. Fellowes, so that there seemed little interest felt on the other side, and no doubt whatever of Fellowes having a clear majority at that polling place when it must finally close at five o'clock on the second day. But it was material nevertheless that the number of votes polled there for the defendant Fellowes should be much larger, in order that they might help to balance the votes which might turn out to have been given for Loux at the other polling places. In order, therefore, to swell the number on the poll book, it appears that the names of 347 persons were within three or four hours of the close of the poll on the second day entered as voters for the defendant Fellowes; and no one can read the evidence at the trial, and the affidavits which have since been filed on the part of

the defendant, without being satisfied that there were votes either given in the names of fictitious persons, or at any rate of persons who had not made their appearance at the hustings and given any vote there, and for all that appears had no right to vote. After the many months that have elapsed since, no account is given of this crowd of persons whose names were all gravely written down upon the poll book. It is not pretended that they were seen at the hustings, going up to give their votes, as they must have done if the whole was not a fiction. It is plain and undeniable that a gross outrage was committed upon the occasion upon the constitution of the province, and that the statute law which regulates elections was grossly violated.

If the evidence of Bedell were wholly cast aside, we should then be left to conjecture by what contrivance these names were placed upon the poll, and it would not be material to learn the exact process. His account of the matter is that he and another man named Ellis, two foreigners who were casually in that part of the country, and who could read and write, were prevailed upon to receive lists of names and of qualifications, and to go with them to the poll: that they were admitted into the room where the poll was being taken: and that, taking advantage of such times as there happened to be when there were no persons on the outside giving their votes through an open place in the window, they went through the farce of calling out the names in succession as rapidly as they could, which being unobjected to were written down in the poll book by the clerk as the names of actual *bonâ fide* voters to the large number we have mentioned. That all this is not a fiction of the witness Bedell is sufficiently plain, for these votes of persons whom nobody knows at all still appear on the roll. They were added up with the other 40 or 50 which had been duly taken, and the poll book thus showing about 390 votes in favour of Mr. Fellowes was without delay forwarded to Mr. Keays, the returning officer, who, reckoning in these votes with the others which had been given for the same candidate at the other polling places, found that they placed him above the other candidate Mr. Loux, and he was accordingly returned as duly elected, upon

which return he took his seat, and sat as the representative of the county of Russell.

Then, as to there being a total want of corroborating evidence to connect the several defendants with this transaction, if we could truly hold that there was no such evidence, and that all rested solely on Bedell's testimony, then the objection would apply that the defendants had been convicted solely upon the evidence of a man who by his own account was an accomplice in the crime, and whose character is shewn to be such as to make him wholly unworthy of belief. The appeal to the court for a new trial on such a ground would be strong. Whether it should be considered irresistible or not is unnecessary to say; each case must depend on its own circumstances. If there had been nothing but Bedell's evidence to connect any of these defendants with the fraud, it might have been thought by us proper to grant a new trial as to all. If there had been evidence from other sources against one or more of the defendants, but no evidence whatever but Bedell's against some one or others of them, then we might have thought it right to grant relief by a new trial to those against whom there was no corroborating testimony, which, however, could only have been done by granting a new trial to all, in order that the whole case should be tried as at first. Such is the established practice in criminal cases where all the defendants have been convicted, and it is found that one or more of them have a just claim to a new trial.

But we must consider whether it can be said with any propriety that there was no corroborating testimony against the defendants, or in the case of any of them. First, as regards the defendant Fellowes, he was the person whose return was procured by the contrivance complained of. On the Sunday that intervened between the two days of polling he came to the polling place in Cambridge, and was there throughout that day in the house of Martin Casselman, within a few yards of the place where the votes were taken. There is no evidence that he was seen in the polling room, but he could easily communicate with any of the other defendants. The jury would naturally consider whether it

is credible that he came there for no purpose, and that he took no interest in and received no communication as to the state of the poll, or what was going on. He left a few hours after the poll was closed, and went in company with the bearer of the poll book to the place where the returning officer was to be found, where the results of the several elections were to be compared, and where the issue was to be proclaimed. It is quite incredible that he could have believed 347 votes had been polled in Cambridge in the afternoon of the second day, and that the poll book was worthy of any credit as a record of votes honestly and actually given. It is plain in what has been placed before us that he knew this could not be so, and he acquiesced silently, as it seems, in the return. There are other circumstances in the evidence respecting the conduct of Mr. Fellowes after the transaction had been exposed, and an enquiry had begun to be made respecting it, which we need not now advert to, but which were proved at the trial, and could not but have weight in leading to the conclusion that he was concurring in what was done, though it is true that Bedell alone gave any evidence at the trial of any particular act of this defendant before the close of the poll in promotion of the object of the illegal combination.

Then, as regards the second defendant, Crysler. He was a deputy-returning-officer, holding the election at Cambridge. He ought to have seen and known, and must be supposed to have seen and known, how these votes got upon the poll book. He was the town clerk of Cambridge, and could hardly but have a general knowledge of the resident inhabitants. It has been in no manner attempted to be shewn on his part that the 347 names, or any portion of them worth mentioning, came forward as voters should, and openly tendered their votes, so as to account for the appearance of their names on the poll book. If they were not taken down and entered as Bedell stated they were, it is not shewn by what other process they found their way there, though if there had been any honesty in the matter, it could have been easily shewn. In Crysler's affidavit I observe he swears that he had no names returned in the poll book except such as gave

their votes, which is so far a confirmation of Bedell's statement, as it serves to shew that a form of some kind was gone through of calling out names to give the semblance of the reception of those votes, when in reality the whole was a fraudulent pretence. If 347 persons had come forward one by one, and voted in the afternoon of Monday, it could easily have been shewn that such a proceeding was known and observed by others to be going on. The defendant must well have known, that if the great number of names was in fact called out, they were not answered by the different voters themselves. The time would not have admitted it, and if they had even attempted it that would have been known to a multitude of persons who could afterwards have proved it. No one can doubt that the defendant Cryslar well knew that the whole was a mockery, and yet he subscribed at least to the oath in proper form, that the votes had been properly recorded and the poll book duly kept.

The same remarks apply in substance to the third defendant, John Saxon Casselman, the poll clerk. He is an inhabitant of the township, and may be supposed to have some general knowledge of the inhabitants and their probable number. If the 347 voters came up severally, and gave their votes, as the poll book kept by him imports, he must have seen and known it, and would have attempted at least to give some evidence of it upon the trial; but he knows well that he saw nothing of the kind, and that he lent himself to a most dishonest contrivance to defeat the election law, and grossly abused his office as poll clerk, and yet he afterwards subscribed an oath that so far as he knew the poll had been duly taken, which of course means that the election had been honestly and legally conducted. It was argued before us on his behalf, that his duty was to take down such names as the deputy returning officer directed to be entered. No doubt it was the decision of the deputy-returning-officer in regard to the right of each voter that must govern at the time, but that means his direction and decision in regard to votes actually tendered and received apparently in good faith, not that the poll clerk was to set down and record a hundred or a thousand names which the returning officer or

any other person may call out to him, when it must have been evident that no such persons had really voted or presented themselves for that purpose.

Of the remaining defendant, Martin Casselman, the evidence that was given by Bedell did directly implicate him in the deceitful contrivance which he described; but apart from the evidence it was proved that he was a zealous agent of Mr. Fellowes: that he was desirous to keep the friends and agents of Loux out of the polling room: that he was present from time to time during the polling, his son being the poll clerk; and his conduct afterwards shewed that he took an interest in what was taking place up to the time of the final return. No one can read the evidence and doubt that he was well aware of the apparent state of the poll from the insertion of the immense number of voters near the close of it. He was reeve of the township, and must have had good means of knowing that there was no truth in any such number of real votes having been received, or of any such number of voters having been seen at or near the polling place; and yet he suffered his son as poll clerk to take an oath (if indeed he did administer an oath on the occasion) that so far as he knew the poll had been duly kept and the votes properly recorded. It is possible no such oath was in fact taken before him, but was only pretended to be taken, but if so, that would only shew still more clearly his complicity in what had been going on.

These facts are independent of what Mr. Bedell swears to, and are strongly corroborative of his evidence. That he is a witness little worthy of credit from his character no one can doubt. No respectable man could have acted the part which he declares he did act in this matter, but that may be said in regard to accomplices generally. Still the law admits them as witnesses, and the jury are to judge of their evidence in connexion with the other evidence, and to form their conclusion upon their view of the whole case.

In regard to the alleged conspiracy, it was clearly unnecessary to prove that these four defendants, or any two of them, actually met together and concerted such a proceeding as appears to have been carried out. That they did combine

and conspire to effect by fraud the return of Mr. Fellowes may be inferred from all the circumstances: and if the jury were satisfied from their conduct, either together or severally, that they were acting in concert, then they were right in looking upon the conspiracy as proved. The law in this respect was correctly stated to the jury by the learned judge, whose report of the evidence and of his charge we have carefully considered. And it is material we should state, that having had the best opportunity of judging of the truth of the testimony from presiding at the trial, he does not report to us that he is dissatisfied with the verdict. It would be doing what is very unusual in a criminal case, and especially of this description, to grant a new trial upon the evidence under such circumstances, though if we could hold that the verdict was rendered in any respect contrary to law the concurrence of the judge who tried the cause in the finding of the jury ought to have no weight with us, and would have none.

For the reasons we have stated we decline to grant the rule moved for.

Rule refused.

COUSE v. CLINE.

Landlord and Tenant—Expiration of landlord's interest—Payment of rent afterwards with knowledge—Ejectment.

The plaintiff holding a lease under the Crown, which expired in 1854, executed a lease to defendant for six years from the 1st of April, 1845. After the expiration of his term he continued in possession, and paid rent as before, up to and for 1857, though, as the jury found, he was aware in 1856 that the plaintiff's term under his lease from the Crown had ceased. *Held*, that the plaintiff was entitled to recover.

EJECTMENT for the south halves of lots 13 and 14 in the sixth concession of Clinton.

At the trial, at Niagara, before *Robinson*, C. J., it appeared the Crown leased the south half of lot 14 to the plaintiff, Couse, to hold for twenty-one years from the 24th of June, 1833; and leased the south half of lot 13 to one Meyer for twenty-one years from the 25th of December, 1833, which term came by assignment to the plaintiff.

On the 11th of March, 1845, the plaintiff holding both

terms, leased both half lots to the defendant for six years from the 1st of April, 1845, for certain proportions of the crops to be delivered yearly as rent.

The defendant entered and enjoyed under his lease to the end of the six years, and had continued in possession from thence to the time of the trial, without any new or other agreement having been made between him and the plaintiff, and up to and for the year 1857 the defendant had paid rent in kind, in the manner specified in his former lease.

Before commencing this action the plaintiff gave notice to the defendant to quit possession.

The plaintiff gave notice of claim only as landlord, stating that he had made a lease to the defendant which had expired.

The defendant in his notice of claim set up no title in himself, but denying the title of the plaintiff, asserted that the title which the plaintiff held when he leased to the defendant had expired long before the commencement of this suit; namely, on the 1st of May, 1851.

At the trial the plaintiff contended that he could recover against the defendant, although the interest which he had held in 1845, when he leased to the defendant, had expired, because the defendant, while he continued to hold under him, as he contended he did from year to year after the 1st of April, 1851, under the terms of the old lease, knew that the plaintiff's term had expired. The defendant denied that he had such knowledge, and the learned Chief Justice received evidence upon that point.

There was no proof of any rent being paid after 1857, and it was understood to be admitted that there never had been.

Upon the evidence given to them, the jury found that the defendant did know in 1856 that Couse's leases from the Crown had expired.

A verdict was directed for the defendant, reserving leave to the plaintiff to move to have a verdict entered for him upon the evidence, if the court should think he was entitled to recover.

Cameron, Q. C., obtained a rule *nisi*, accordingly, citing *Fenner v. Duplock*, 2 Bing. 10; *England dem. Syburn v. Slade*, 4 T. R. 682.

O'Reilly Q. C., shewed cause, and cited *Doe Strode v. Seaton*, 2 Cr. M. & R., 728; *Neave v. Moss*, 1 Bing. 360; *Downs v. Cooper*, 2 Q. B. 256; *Claridge v. Mackenzie*, 4 M. & G. 143.

ROBINSON, C. J., delivered the judgment of the court.

Although it seemed otherwise to me at the trial, our opinion now is that the plaintiff is entitled to recover.

We are to take it that the defendant knew in 1856 that the plaintiff's interest under his leases from the Crown had expired, as it had in fact before the year 1855. Then we are to consider that the defendant's written lease from the plaintiff expired in April, 1851, but the defendant nevertheless continued ever since in possession, paying rent according to the terms of the expired lease to the end of 1857; but no rent since. The effect of this was to place the defendant in the position of tenant from year to year on the terms of the old lease, until the tenancy should be put an end to by notice. Having received notice to quit, he was an overholding tenant at the time of this action brought, and an overholding tenant, whose last year's tenancy commenced from April, 1857, at which time he knew that the plaintiff, from whom he had taken the place, no longer held any legal interest. So that this is not the case of a landlord's interest expiring after he made the lease, if we consider that the tenant was in possession in each year after 1854 as under a new lease for a year, for the position of the landlord in that respect had not changed; and it seems to us that the tenant is in the same situation as any overholding tenant would be, who when he is required to leave attempts to set up as a defence that the landlord has no right to turn him out because he had no right to put him in. That line of defence, as a general rule, is not permitted to an overholding tenant. By paying rent in and for 1857, the tenant acknowledged the right of the plaintiff as landlord, and nothing had happened afterwards to make any change in the

landlord's interest. Nothing had occurred since the defendant took the place, except what the defendant knew in 1856, and yet in 1857 he became and was the tenant for a year of the same landlord, who is now no more without legal interest in the land than he was in 1856.

It seems, therefore, in principle, not to be different from the case of any one who should take a lease from a squatter, and such a tenant cannot refuse to go out on the ground that there was no right to lease to him. He must first give up the possession.

We think *Fenner v. Duplock* (2 Bing. 10) fairly decides this case in favour of the plaintiff, and the case of *Claridge v. Mackenzie*, (4 M. & Gr. 143,) which was cited on the argument for the defendant, is not applicable when the facts are considered, for in that case, besides other points of difference, the tenant had not been put into possession by the party whose right to turn him out he was disputing. It is material, too, that in such cases as this, of Crown leases, the lessee of the Crown has often conditions in his favour as to right of renewal, and of preemption, and it may be important, therefore, that he should be allowed to regain the possession which he held as such lessee.

In our opinion, the rule to enter a verdict for the plaintiff should be made absolute.

Rule absolute.

THE STREETSVILLE PLANK ROAD COMPANY v. THE CORPORATION OF THE VILLAGE OF STREETSVILLE.

Streetsville Plank Road Company—10 and 11 Vic., ch. 95, sec. 20—*Right to statute labour.*

The plaintiffs, a plank road company, were incorporated by the 10 & 11 Vic., ch. 95, which authorised them to make a road *from* the town of Streetsville to different points specified, and enacted that they should have the right to claim the statute labour, by commutation or otherwise, to the extent of one half concession on each side of their road, and to collect it from the persons liable. The village of Streetsville was within one half concession of the plaintiffs' road, which ran through it, and was incorporated in 1857. In 1858, the village council imposed and collected a rate, of which a certain sum was for commutation of statute labour.

Held, that the plaintiffs were entitled to recover from defendants as money had and received so much of this sum as was received in respect of persons or property forming no part of the town of Streetsville mentioned in the plaintiffs' act of incorporation, but within half a concession on each side of their road.

This was an action on the common counts for money had and received; and by consent of the parties, and by the order of the honourable Mr. Justice *Hagarty*, the following case was stated for the opinion of the court:

CASE.

The plaintiffs were incorporated by statute 10 & 11 Vic., ch. 95, by the 20th section of which it is enacted, "that the said company" (meaning the plaintiffs) "shall have the liberty to claim the statute labour, by commutation or otherwise, to the extent of one half concession on each side of "the said line of road," (meaning the road of the plaintiffs,) "which the company are authorised to demand, receive, and collect from the inhabitants residing thereon, being liable by law to perform the same." The statute 13 and 14 Vic., ch. 66, repeals all previous acts requiring the performance of statute labour, and by ch. 67 of the same session provision was made for regulating and enforcing the performance of such labour: this latter statute was, however, repealed by 16 Vic., ch. 182, which regulated the law on the subject of statute labour at the time of the incorporation of the defendants as hereinafter mentioned.

The village of Streetsville, at the time of the passing of the plaintiffs' act of incorporation, and up to the time of its being set apart as an incorporated village, as presently mentioned, formed part of the township of Toronto, and lies within one half concession on each side of the Streetsville plank road, (the plaintiffs' road,) which runs through the said village.

On the 26th of November, 1857, his Excellency the Governor-General by proclamation set apart the village of Streetsville as an incorporated village under the provisions of the municipal acts in that behalf. This incorporation was confirmed by the statute 22 Vic., ch. 47, by which Streetsville is declared to have been from the date of such proclamation an incorporated village, with such powers and privileges as were then or should thereafter be conferred on incorporated villages in Upper Canada.

In the year 1858, and after the incorporation of the village, the municipal council of the village proceeded to make an assessment according to law, and they imposed in the regular way a rate of a certain sum in the pound on the taxable property of the inhabitants, as also the sum of ten shillings upon each of the male inhabitants between the ages of 21 and 60 years, who were not assessed on the assessment roll of the village, or if being assessed whose taxes did not amount to ten shillings currency, which sums were collected in the same manner as the other local taxes for the use of the corporation of the place, and all the taxes so collected were not more than was necessary for the purposes of the corporation during the then current year.

The amount received by the village corporation from the last mentioned source, (namely, the ten shillings from persons between the ages of 21 and 60 years, who were not otherwise assessed or whose taxes did not amount to ten shillings currency,) was in the said year 1858, £13 15s. currency, and for this sum the plaintiffs now bring their action, claiming it as commutation of statute labour. The said taxes for 1858, were assessed and collected prior to the coming into operation of the municipal act 22 Vic., ch. 99.

The questions for the opinion of the court are :

First—Whether the plaintiffs are entitled to statute labour, or money in commutation of statute labour, from the inhabitants of incorporated villages in respect of their property situate within the limits of such village corporation, and from inhabitants of such incorporated villages between the ages of 21 and 60, who are not otherwise assessed, or whose taxes do not amount to ten shillings currency.

Second—And, if the plaintiffs are so entitled to statute labour and commutation money from the inhabitants of such incorporated villages, then whether the plaintiffs can recover as against the defendants the said amount of £13 15s. so collected and received by them as such corporation, under the above circumstances.

If the court shall be of opinion in the affirmative of both questions, then judgment shall be entered for the plaintiffs, for the said sum of £13 15s. and costs of suit.

If the court shall not be of opinion in the affirmative of both questions, then judgment with costs of defence, shall be entered for the defendants.

Cameron, Q. C., for the plaintiffs.

James Paterson for the defendants.

ROBINSON, C. J., delivered the opinion of the court.

The question raised in this case cannot be affected by any provision in the present municipal act, because that did not come into force till the 1st of December, 1858. It is governed by the 10 & 11 Vic., ch. 95, sec. 20, and 16 Vic., ch. 182, and by any thing that there may be bearing upon it in the municipal acts in force up to the 1st of December, 1858.

The 20th section of the statute 10 & 11 Vic., ch. 95, vested a valuable right in the company, which we must look upon as a part of the consideration which induced them to venture upon the undertaking, and we may assume that it was intended to be a permanent right as well in this particular part of the line of road between Streetsville and Port Credit as in any other. The taking the privilege from the company, therefore, after they had been at the expense of making the road, and while they still have to keep it in repair, giving them no equivalent for it, would be an evident injustice, and we ought not to give such an effect to any statute passed since, unless its enactments clearly shew that to have been the intention of the legislature.

We do not find any thing in the statutes that bears on the question, besides what is contained in the 10 & 11 Vic., ch. 95, secs. 2, 9, 20 and 40; 16 Vic., ch. 181, sec. 16; and 16 Vic., ch. 182, sec. 35; and we see nothing in these that shews us that the legislature meant to authorise the village to take to itself, contrary to 10 & 11 Vic., ch. 95, sec. 20, any statute labour, whether commuted or otherwise, from the inhabitants living within the limits mentioned in the clause referred to. That statute labour must continue to be avail-

able to the company, until it has been otherwise clearly appropriated, and though the incorporated villages are bound to keep the streets in repair, still they have ample power to impose taxes for that purpose.

The council, it appears, have got into their hands money which the plaintiffs have a legal right to, and an action will lie for it, as it will lie by a public officer for his fees which have been illegally received by another. In section 20 is a continuing provision applying to the time being, and if the tax were otherwise appropriated generally, yet this statute labour would be excepted unless specially referred to, just as where one makes a grant of all his lands, those lands are excepted which he had before granted to others.

We were about to give judgment last term in this case, disposing of it according to the opinion which we have just expressed, when it struck us that although it is stated in the case submitted to us, that the Streetsville plank road passes through the village of Streetsville, yet in fact the statute 10 and 11 Vic., ch 95, sec. 2, only authorises the company to make a road *from* Streetsville to Port Credit; and to extend it *from* Streetsville to a certain part of Chinguacousy which is in the opposite direction from Streetsville.

This description of the proposed road, in two directions *from* Streetsville, both ways, excludes Streetsville itself, or at least such part of the present incorporated village as then formed what in the act is called the town of Streetsville, which the legislature, it is clear, did not intend the company to interfere with.

We were not informed of any subsequent enactment which has made a change in that respect, and therefore our judgment must be applied with this qualification, that it can only determine the question so far as regards the right to commutation money for statute labour, which has been received in respect of property or persons within such part of the present incorporated village of Streetsville, as formed no part of the "Town of Streetsville," mentioned in the statute 10 and 11 Vic., ch. 95, at the time of the passing of that act, though otherwise within the 20th clause of that act.

Judgment for the plaintiffs.

MAY AND RUTLEDGE v. HOWLAND, FITCH, AND WEBB.

Interpleader—Verdict for claimant—Subsequent action by him against execution plaintiffs—Excessive damages—Form of declaration.

The goods of one L. having been seized under an execution at the suit of defendants, were claimed by the plaintiffs, and upon the sheriff's application a feigned issue was ordered, which directed that no action should be brought against the sheriff, but expressly excepted any claim which either the execution plaintiffs or the claimants might have against each other. This issue having been decided in the plaintiffs' favour, they brought an action against the defendants (the execution creditors) for the acts of the sheriff in entering and excluding them for two months from possession of the foundry where the goods were, and for stopping the work and preventing them from selling some of the articles which were being manufactured. The jury gave \$50 for the first cause of action, and \$300 for the second.

Held, that the action would lie, and that the damages were not excessive. *Held*, also, that the defendants having pleaded to the declaration as containing two separate counts, could not afterwards object that there was but one.

The declaration alleged that the defendant broke and entered certain lands of the plaintiffs, situate, &c., and also seized and took down goods and chattels of the plaintiffs, to wit, &c., and carried away the same, and converted and disposed thereof to their own use, and likewise wrongfully seized and kept possession of, and deprived the plaintiffs of the use and possession of, their goods and chattels of the same kind and nature and value as the foregoing goods and chattels, and wrongfully detained and kept possession of the same for eight months, by means whereof the plaintiffs were greatly disturbed in the possession of the said premises, and prevented from carrying on their business, &c.

Pleas—1st. Not guilty. 2nd. To the first count, denying the plaintiffs' title to the close. 3rd. To the first count, leave and license. 4th. To the second count, denying the plaintiffs' property in the goods. 5th. To the second count, leave and license.

At the trial at Toronto, before *Draper*, C. J., it appeared that the defendants in this action, Howland, Fitch, and Webb, had obtained judgment against one Ira Lefler, and Lefler's goods being seized under an execution issued upon that judgment, May and Rutledge, the plaintiffs in this suit, claimed them, and on the 2nd of March, 1859, the sheriff having moved under the Interpleader Act, an order was made in the usual form for an issue to be made up and tried,

in which May and Rutledge should be plaintiffs, and Howland & Co. defendants, to try the property of the plaintiffs in the goods. The interpleader order directed that without barring any claim which either the execution plaintiffs or the claimants might then have either at law or in equity against each other, no action should be brought against the sheriff for and in respect of the goods and chattels.

The interpleader issue having been determined in favour of the claimants, who had obtained possession of the goods in the meantime from the sheriff, by giving security in the terms of the order, this action was brought by them to recover damages which they had sustained by their premises having been entered, and the goods seized at the instance of the defendants upon their execution.

The premises belonged to Lefler, who had carried on the business of an iron-founder there up to January, 1858, when he mortgaged the stock in the foundry to one Lawrence for a debt due to him, but continued in possession of the foundry and of the goods mortgaged, till Lawrence entered into possession under his mortgage in October or November, 1858; and in January, 1859, Lawrence had the goods sold by public auction, when they were bought by the present plaintiffs, May and Rutledge. It was under this title that they made this claim, which in the interpleader suit was decided in their favour.

The jury took a verdict for the plaintiff for \$50 damages on the first count, and \$300 damages on the second count.

McMichael, for the defendants, moved for a new trial on the law and evidence, and for misdirection, in holding that this action would lie, notwithstanding an interpleader order that had been made in consequence of the seizure of the goods, and in ruling that substantial damages might be recovered for detention of the goods which were not in use; and that the rent of the premises could be given in evidence. Also, for admitting improperly evidence of prospective damages; and for excessive damages; and because the declaration containing only one count, and no evidence of a

trespass to real property having been given, damages for injury to goods could not be given as matter of aggravation. He cited *Carpenter v. Pearce*, 27 L. J. Ex. 143; *Winter v. Bartholomew*, 11 Ex. 704; *Cater v. Chignell*, 15 Q. B. 217; *Cotton v. Stokes*, 10 U. C. R. 262; *Tinkler v. Hilder*, 4 Ex. 187; *Hollier v. Laurie*, 3 C. B. 334; *Abbott v. Richards*, 15 M. & W. 194.

Burns shewed cause, and cited *Stokes v. Eaton*, 3 C. P., 267; *Barclay v. Adair*, 7 C. P., 157.

ROBINSON, C. J.—Upon the trial of this suit the plaintiffs endeavoured to support a claim for large damages, first, by reason of the entry into the premises by the sheriff, under the *fi. fa.* in favour of the defendants against Lefler, and stopping the business which they alleged they were then carrying on in the foundry under the direction of Lefler, whom they employed. The premises had been shut up by the sheriff for about two months after the seizure.

If the jury had adopted the calculation of damages submitted to them on the part of the plaintiffs, of the profits they might have made, if they had not been so interrupted, it is plain that they would have given a verdict for several hundred pounds. But the learned judge discountenanced their giving damages for the loss of probable profits, and the jury in fact gave £12 10s. only for the injury done to the plaintiffs by wrongfully entering the premises, while they were in as tenants to Lefler at the rent of £12 10s. a year, and excluding them from possession for two months. We could not with any propriety give relief against those damages as excessive.

Then for the other injury complained of, namely, the seizing and detaining all the stock in trade belonging to the plaintiffs, which included machinery, tools and materials, and many things which were at the time partly finished, and were in the course of being made up; the jury gave £75 damages, to which I think no reasonable objection can be urged on the part of the defendants.

It appears to me that the defendants can in no respect complain of the verdict. It is plain that they adopted the

act of the sheriff in entering upon the premises in question, and seizing the chattel property there, as if it belonged to Lefler, their execution debtor, when in fact, as we must now conclude, these plaintiffs were at the time the real owners. The interpleader order only restrained actions against the sheriff, but left the claimants at liberty to sue the execution creditors for any injury done to their property by the wrongful acts of the sheriff committed for their benefit, and at their instance. I have no doubt that when the defendants authorised and supported the seizure they were acting under the sincere conviction that the mortgage to Lawrence was colourable, and that the subsequent sale of the goods to the plaintiffs was also a scheme to maintain Lefler in possession against his creditors, and to give him an opportunity of carrying on the business without molestation for his own profit, under cover of a pretended agency for these plaintiffs. But they were unable to prove this to the satisfaction of the jury, and what has followed cannot be complained of, at least not with effect.

It is not easy to determine whether the declaration contains one count or two, but the defendants themselves pleaded to it as if there were two independent counts, and they cannot complain that the plaintiffs acquiesced in this view of it.

The entering on the premises was clearly illegal if the goods did not then belong to Lefler, and the plaintiffs had a right to claim damages for that as well as for taking the goods.

McLEAN, J.—The foundry was closed by the sheriff's officer, and continued so for several months, so that the plaintiffs were deprived of the use of the building, as well as of the stock and material which it contained, during that period. It was also proved that they were deprived of the opportunity of selling certain agricultural implements, which they had purchased with the rest of the effects when they were sold at public auction under the mortgage which covered them, made by Lefler.

It is for the trespass in entering the foundry that the plaintiffs

seek to recover under the first count of their declaration, and the trespass and detention of the goods, and the injuries arising therefrom, form the ground of action on the second count.

The defendants contended that they were not liable for the damages arising from the act of the sheriff's officer in seizing the goods and locking up the premises in which they were contained, and that the fact of their having become parties to the trial of an interpleader issue for the purpose of trying the validity of the plaintiff's claim, could not make them trespassers. This argument would undoubtedly hold good in behalf of the defendants, if they had given no directions, and had not interfered with the goods after their seizure by the sheriff's officer. They might have abandoned their claim when called upon to interplead or to have their claim barred. They chose to adhere to the seizure, and took it upon themselves to establish that the goods were Lefler's, and so liable to be sold on their execution. The goods were in consequence detained, and the plaintiffs kept out of the use of them for several months. In interpleading the defendants adopted the act of the sheriff, and have rendered themselves liable for the consequences. Besides this, it was shewn that on several occasions, while the interpleader suit was pending, some of the defendants went to the premises and gave up to certain claimants articles which were in the foundry, which the plaintiffs did not claim, and which were known not to belong to Lefler. This fact established that the goods were under the control of the defendants, and that such control was exercised by them, and if the plaintiffs sustained an injury by it they must have a right to recover the amount of that injury. The plaintiffs might have had their goods delivered up to them by paying the amount of defendants' claim into court, or by giving security for it to the satisfaction of the sheriff; but this they might have been unable to do, and at all events they were under no obligation to do so. By the interpleader order the sheriff was protected from any suit by either the claimants or the execution creditors, and the defendants assumed his responsibility when they came forward and undertook to establish the liability of the goods to seizure under their execution.

It does not appear to me that the damages can be considered as excessive, considering the evidence given by the plaintiffs as to the actual amount of injury. Proof of payment of rent for the foundry was given, not as a criterion by which damages might be measured, but for the purpose of shewing that the plaintiffs were the parties entitled to claim damages for a trespass in entering it. More damages may have been given on the last count than necessary, as the goods were all given up in nearly the same order as when seized, but that was a matter for the jury, and the amount is not so large as to justify the court in interfering on that account.

But the defendants object that there is but one count in the declaration, and that the damages to the goods form only a matter of aggravation to be given in evidence under the first count, which is for a trespass to lands.

The defendants have pleaded to two counts, and the trial proceeded and damages have been awarded on two counts; it is therefore rather too late to urge an objection arising from the want of some technical expression to shew the commencement of the second count, even if it were so, but I think it sufficiently appears by the declaration that the plaintiffs are proceeding for two distinct causes of action, the first for trespass to lands, and the second for trespass to goods.

On these grounds I think that the rule for a new trial must be discharged.

BURNS, J.—It seems to me all right that the plaintiffs should recover. I think there was no misdirection in the learned Chief Justice of the Common Pleas telling the jury there was evidence for them to consider the question of damages in respect to the realty. Suppose the goods found there were liable to be seized, yet the sheriff remaining in possession of the plaintiffs' property, and keeping them out for an unreasonable time, would of itself have made the sheriff a trespasser. Then we see that in this case the defendants adopted the sheriff's act, and joined in an interpleader to try the right to the goods. The length of time which the sheriff kept the plaintiffs out of possession of

the buildings might occasion them damage, and the amount of damages found by the jury is moderate enough for some sixty-five days.

With regard to the point whether any difficulty is presented by the circumstance of there being only one count in the declaration, and the defendants having pleaded to it as if there were two counts, I do not think the defendants can now take any advantage of that, if indeed there ever was any thing in the objection. The defendants have divided their pleas into defences to first and second counts, but we see those defences are intended to cover the plaintiffs' claim separately as to the freehold and as to the goods. They might have pleaded precisely in the way they have done to the whole as one count, separating the claim in respect to the trespass to the freehold, and in respect of the goods. I do not see that any harm is done by the defendants' mistake, for it is their error, and if it were necessary we might now allow the plaintiffs to amend by adding a few words, in order to make the declaration read as if there were two counts instead of one, but it does not appear to me necessary.

I see no misdirection in respect of what the learned Chief Justice told the jury with regard to the measure of damages the plaintiffs were entitled to for the loss occasioned to the goods, and I do not see that any improper evidence was received. The interpleader issue it seems has been decided in the plaintiffs' favour, and therefore the right of property determined on that issue, but still we see the defendants have again in this suit denied the plaintiffs' right of property. Upon that issue the plaintiffs were entitled to succeed most certainly. They got their goods back after a detention of sixty-five days, upon giving security under the interpleader order. The sheriff is protected by that order from being sued by the plaintiffs, but that does not interfere with the plaintiffs' claim against those who set the sheriff in motion. Indeed by the terms of the order the plaintiffs' rights against the defendants are expressly reserved. Had the defendants declined to accept the issue offered them, and disavowed the act of the sheriff in seizing the plaintiffs' goods, so that no other order would have been made than barring the execution

creditor from bringing an action against the sheriff, the plaintiffs would have had a good right of action against the sheriff for trespass to their goods. It must follow, as a consequence, that if the defendants adopt the act of the sheriff, and by reason of that the plaintiffs are barred from suing the sheriff, the defendants themselves must answer for it, unless the court or the judge for some reason, if they have the authority to do so, make such terms by the issue granted as would bar the right. There may be cases wherein all parties would be benefitted by the interpleader issue determining all the rights of the parties, and in such cases it might be right enough that taking the benefit of the order would be sufficient to bar all actions. Here it is not so. The plaintiffs got their goods restored upon giving security, it is true, but then they were deprived of them for a considerable time, for which they could not receive any compensation in the disposal of the issue. And besides, by some means, which seems to me not right, the defendants have again denied the plaintiffs' title to the goods, which the interpleader issue disposed of.

Rule discharged.

THE BANK OF TORONTO V. WILMOT AND WORTS.

Principal and surety—Bond for performance of duty—Change in the mode of remuneration.

To a declaration against a surety on a bond, conditioned for the faithful performance of his duty by W., so long as he should continue in the plaintiffs' service in the capacity of their agent at N., or in any other capacity whatsoever, defendant pleaded, that W. entered into the plaintiffs' employment as such agent at a certain commission or per centage on the business done, and defendant executed the bond under the agreement that he should be so paid, and that afterwards the plaintiffs, without defendant's knowledge or consent, changed the mode of remuneration to a fixed salary.

Held, no defence.

Declaration on a bond, reciting that the defendant Wilmot had been appointed agent of the plaintiffs at the village of N., and conditioned that the said Samuel Wilmot should from time to time, and so long as he should continue in the service or employ of the said bank in the capacity of agent at N., or in any other capacity whatsoever, honestly, dili-

gently, and faithfully demean and conduct himself in such service or employ, &c., assigning several breaches.

Plea.—That after the making of the said writing obligatory, the said Samuel Wilmot entered into the employment of the plaintiffs as their agent at N. aforesaid, at a certain commission or per centage upon the business done by the said Wilmot for the plaintiffs: to wit, the sum of one-half of one per cent. upon all such business; and that the defendant Worts entered into the said writing obligatory, as the surety of the said Wilmot, with the knowledge and under the agreement that the said Wilmot should be paid for his services as such agent by the plaintiffs by such commission and per centage, and that afterwards, and before any breach of the condition of the said writing obligatory, the plaintiffs, without the knowledge or consent of the defendant Worts, changed the mode of remuneration of the defendant Wilmot as such agent as aforesaid from the payment of such commission and per centage as aforesaid to a fixed salary per annum—to wit, the sum of £200 per annum—without any reference or consideration to the amount of business to be done by the said Wilmot as agent of the plaintiffs as aforesaid.

Demurrer.—On the ground that, as the condition of the bond is silent as to the remuneration of the defendant Wilmot as the plaintiffs' agent, a change in such remuneration cannot affect the liability of the defendant Worts as such surety.

Eccles, Q. C., for the demurrer.

Cameron, Q. C., contra, cited *Bonar v. Macdonald*, 3 H. L. Cas. 226; *Bank of Upper Canada v. Covert et al.*, 5 O. S. 541; *North Western R. W. Co. v. Whinray*, 10 Ex. 77; *Frank v. Edwards et al.*, 8 Ex. 214; *Holland v. Lea*, 9 Ex. 430.

BURNS, J., delivered the judgment of the court.

We do not think the plea of the defendant Worts affords him any defence against the plaintiffs' claim upon the bond sued upon. The language of the court in *Myers v. Edge* (7

T. R. 256,) is this: "We are to judge on the contract that the parties have made, and ought not to substitute another in lieu of it." Now the contract, as contained in the condition of the bond in this case, is "that if the said S. Wilmot shall from time to time, and so long as he shall continue in the service or employ of the said bank, in the capacity of agent at Newcastle, or in any other capacity whatsoever, honestly, diligently, &c." Nothing has been said as to the mode of remuneration of Wilmot's services. What the plea desires to make out as avoiding the bond is, that when it was entered into Wilmot was to be paid by a per centage, and that subsequently the bank changed that mode of payment, and substituted a fixed salary. Taking that to be true, as we must, upon the demurrer, we are of opinion none of the cases cited touch the point.

The case of the Bank of Upper Canada v. Covert et al., (5 O. S. 541,) was upon a bond given for the performance of the duties of the agent of the bank. The bank had subsequent to the giving of the bond changed the agent into a local cashier, and changed the mode of payment from a per centage upon discounts to a fixed salary as cashier. It was proved that the duties of a cashier were very different from those of an agent, though so far as the duties of an agent extended towards the bank the same duties would be performed by the cashier, but the duties of a cashier were of a more extended nature. The plea in the present case does not shew that Wilmot's duties were altered in any way, or that he had any additional work or duty put upon him, creating any other or additional liability.

The case of the North Western Railway Company v. Whinray, (10 Ex. 77,) shews that the bond itself was signed, reciting that the principal had been appointed the company's agent for the purpose of selling coal for the company *at a yearly salary of £100*. Afterwards the company altered that mode of payment into a commission of sixpence per ton. Now that was a direct alteration of the very agreement itself signed by the sureties.

In the case before us the surety has signed nothing stipulating for the mode of Mr. Wilmot's remuneration. The

plea sets up facts *dehors* the agreement signed by the parties with respect to the different mode of payment, and if that affected the duties of the agent, or altered the liability of the surety, it should have been shewn by this plea how it did so. The bond contemplates that there might be a change in some way, for it provides for the surety being answerable for Wilmot in any other capacity than that of agent.

The case of *Bonar v. Macdonald* (3 H. L. Cas. 226,) does not apply to this case, for there the liabilities of the agent was changed as well as his salary altered. He was by the change rendered responsible for one-fourth of the discounts he should effect at his office, and it was obvious enough, if the sureties were to be answerable for that responsibility, they should have notice and be parties to such an agreement. The agent, when he was asked to give new securities, declined to do so, and upon his letter being read to the board of directors stating that he was willing himself to be personally responsible, but he did not think it reasonable that he should furnish security to that effect, the board, by a minute made to the effect, declared themselves satisfied as the matter then stood.

For all that appears upon this plea, the agreement for remuneration is collateral and independent of the contract of suretyship, and cannot control it.

We think that judgment should be for the plaintiffs.

Judgment for plaintiffs on demurrer.

DUROSS V. DUROSS.

Action for seizure under Fi. Fa. after release of the judgment—Equitable plea—Release awarded by arbitrators and executed by mistake—Demurrer.

Declaration, that defendant recovered a judgment against the plaintiff, and issued a *fi. fa.* thereon, and afterwards, by an instrument under seal duly released the plaintiff therefrom, yet that defendant maliciously caused the sheriff to seize the plaintiff's goods under the writ, and would not direct him to stay, so that the plaintiff was obliged to pay a large sum of money to release them.

Plea, on equitable grounds, that after the recovery of said judgment, and before the release, a *fi. fa.* was issued thereon: that in ignorance of the issuing of said writ, and believing that all the costs on said judgment did not exceed £6 5s., defendant consented to refer all matters between himself and the plaintiff to arbitration: that the arbitrators awarded that the plaintiff should pay defendant £202, and should also pay to him the said costs, which they believed amounted only to £6 5s., and they directed that sum to be paid, in ignorance of the fact that said costs, with the sheriff's fees, in truth amounted to £15: that it was the intention of the arbitrators that all the said costs should be paid by the plaintiff, but neither they nor the defendant became aware of the mistake until after the time for moving against the award had elapsed: that in similar ignorance of these facts mutual releases were directed by the arbitrators, and defendant executed and delivered the release in the declaration mentioned: that before the trespass complained of defendant discovered the mistake, and requested the plaintiff to pay the balance of said costs to the sheriff, which he promised, but afterwards refused to do, and defendant thereupon, with the knowledge and privity of the plaintiff, who took no means to prevent the same, allowed the sheriff to obtain satisfaction of the said balance, as he lawfully might.

Held, on demurrer, plea bad, as shewing no defence.

Held, also, that it sufficiently appeared from the declaration that the seizure took place after the release, and that the objection was at all events removed by the plea.

This was an action removed by *certiorari* from the county court of the county of Simcoe.

The first count stated that the defendant, in the Court of Common Pleas for Upper Canada, at Toronto, recovered against the plaintiff by the judgment of the said court the sum of £203 12s. 7d., which by the said court was adjudged to him, and the now defendant afterwards, for the obtaining satisfaction of a certain residue of the damages recovered by the said judgment, (part of the said damages having been before duly satisfied,) sued and prosecuted out of the said court a certain writ called a *fieri facias*, directed to the sheriff of the county of Simcoe, whereby the said sheriff was commanded, of the goods and chattels of the now plaintiff within his bailiwick, to levy and make the residue of the said damages which he had so recovered as aforesaid; and the

said defendant afterwards duly endorsed and delivered the said writ to the said sheriff to be executed in due form of law. And the now defendant, afterwards, by an instrument in writing under his hand and seal, and duly delivered to the now plaintiff, released and discharged the now plaintiff, amongst other things, from the said judgment, and all damages and costs recovered thereby or incurred therefrom, or lawfully due to or demandable of and from the now plaintiff under the said writ; yet the defendant wilfully and maliciously, without any reasonable cause whatsoever, caused and procured the said sheriff to seize and take the goods and chattels of the plaintiff under and by virtue of the said writ of *feri facias* for the purpose of levying off the said goods and chattels of the now plaintiff a certain amount on the said writ, and did not nor would direct the said sheriff that the said writ should be no longer prosecuted, whereby, and by means of the premises, the plaintiff's goods and chattels were taken from him, until to release the same he was obliged to pay, and did pay the said sheriff a large sum of money; and the plaintiff was likewise greatly injured in his credit and circumstances.

Second count.—And for that also the defendant seized and took certain goods and chattels, to wit, &c., and converted and disposed thereof to his own use.

Defendant pleaded, upon equitable grounds, to the first count, that after the recovery of the said judgment in the first count mentioned, and before the execution or delivery of the said release therein mentioned, there was sued and prosecuted out of the said Court of Common Pleas a writ of *feri facias* against the goods and chattels of the plaintiff, directed to the said sheriff, by his attorney in the said action, to obtain satisfaction of the amount recovered by the said judgment, and the expenses of the said writ, and other incidental expenses, and the sheriff's own fees thereon for poundage and levying: that in ignorance of the issuing of the said writ, and believing that all the costs in the said cause and upon the said judgment did not exceed the sum of £6 5s., the defendant, upon the solicitation of the plaintiff, consented to refer the matters in dispute between him and

the plaintiff, of which the said judgment and the costs thereon, which he believed amounted only to the sum of £6 5s., formed part: that the arbitrators chosen upon the said reference awarded and directed that the said plaintiff should pay to the defendant the sum of £202 in respect of the said matters in difference, and in respect to the said costs they also awarded that the said plaintiff should pay to the said defendant the same, which they believed amounted only to the sum of £6 5s., and by their said award they directed that sum to be paid by the said plaintiff to the said defendant, in error and mistake, and ignorance of the fact that at that time there was a much larger amount, to wit, the sum of £15, due in respect to the said costs, and the said sheriff's charges and expenses upon executing the said writ; which sum the defendant charges and says was then due in respect to the sheriff's fees for executing the said writ; and the defendant further charges and says that it was the intention of the said arbitrators, on making the said award, and they did intend that all the costs incurred by him in the recovery of the said judgment, and all expenses upon the said execution, and the executing thereof by the said sheriff, should be borne and paid by the said plaintiff, and by the said award they intended to direct the same to be paid by the plaintiff to the defendant, but not until long after the making of the said award, and until the time for moving against the same had elapsed, were the said arbitrators nor was the defendant aware of the said error or mistake in the amount of the said costs, and the said sheriff's charges and expenses in executing the said writ: that in further ignorance of the facts hereinbefore narrated, the said arbitrators directed mutual releases to be executed by the now plaintiff and the now defendant to each other, and in ignorance, and in misapprehension of the facts that the said costs and sheriff's expenses exceeded the said sum of £6 5s., and also in ignorance of the issuing of the said execution, and of the sheriff's charges thereon for executing the same, and believing that the said costs did not exceed the said sum, and not being aware of the issuing of the said execution, or of the incurring of the said charges and expenses thereon by the

said sheriff, the defendant executed the alleged release in the first count mentioned, and then, in further ignorance, and in error and mistake aforesaid, delivered the same to the plaintiff, and the plaintiff also in fraud and ignorance of the said facts on his part accepted and took the same from the defendant: that afterwards, and before the committing of the alleged trespasses in the said count mentioned, the defendant discovered the fact of the said error and mistake, and that there was due in respect to the said costs, and in respect to the said sheriff's fees and expenses, a large sum beyond the sum conceived to be due as aforesaid by the said arbitrators and by the plaintiff, and the said defendant, amounting to the sum of £15, and thereupon he requested the defendant to pay the same to the said sheriff, the said plaintiff being equitably liable to pay the same, as this defendant submits and insists he was; and the plaintiff then agreed with the defendant, and promised him to do so in a reasonable time; but although a reasonable time afterwards elapsed, &c., fraudulently, and in disregard of his said promise, neglected and refused so to do, but unduly availed and is availing himself of the said alleged release, alleging that the said release so obtained from the defendant in ignorance of the said facts, and through error and mistake on his part executed and delivered by him to the plaintiff, discharged him, the plaintiff, therefrom, which the defendant submits and insists under the circumstances herein stated it does not, as it was not the intention it should do. And the defendant further saith, that thereupon, in order to obtain satisfaction of the residue of the said costs, and to satisfy the said sheriff's charges and expenses in executing the said writ, with the knowledge and privity of the plaintiff, who took no means to prevent the said alleged seizure, he permitted and allowed the said sheriff to obtain satisfaction of the said balance of the said costs, and the sheriff's charges, which are the supposed trespasses complained of in the said count, as he submits and insists he lawfully might.

In a second plea, to the second count, the defendant set out the recovery of the judgment in the Common Pleas, by him against the plaintiff, as in the first plea, and the

delivery of the writ to the sheriff, and alleged that the goods were seized under the writ, by his direction, to satisfy a portion of the judgment.

The plaintiff demurred to the first plea, on the ground that it was not alleged or shewn by the said plea that the said error and mistake were of a matter material to the execution of the said release, nor denied that the defendant could by reasonable diligence have made himself acquainted with the said facts as to which the said defendant was under a misapprehension.

And to the second plea the plaintiff replied, that after the recovery of the said judgment in that plea mentioned, and after the suing out of the said Court of Common Pleas of the said writ of *fieri facias*, and after the endorsement of the said writ in said plea alleged, and after the delivery thereof to the said sheriff, as in the plea also mentioned, the defendant, before the said time when, &c., by an instrument in writing under his hand and seal, and duly delivered to the plaintiff, released and discharged the now plaintiff, amongst other things, from the said judgment, and all damages or costs recovered thereby or incurred thereupon.

The defendant joined in the demurrer to his first plea, and gave notice of the following amongst other exceptions to the first count of the declaration:—that it is not shewn by the said count that the release therein mentioned was by deed.

And to the replication of the plaintiff to the second plea of the defendant, the defendant rejoined, upon equitable grounds, that before the execution or delivery of the pretended release in the said replication mentioned, and after the recovery of the judgment in the said plea mentioned, and after the delivery of the writ of *fieri facias* to the said sheriff, and in ignorance of the delivery of the said writ, and in further ignorance of the amount endorsed thereon, and directed to be made, the said defendant, by the solicitation of the plaintiff, consented to refer certain matters in dispute between them to the award and determination of Robert Keenan, James Flynn, and James Segworth, of which matters in difference the said arbitrators were empowered to award upon and in respect to the amount to which the

defendant was entitled under the said judgment, and the costs incurred by him in the prosecution of the said action in which the said judgment was recovered: that the said arbitrators proceeded to award, and they did afterwards make their award in writing, under their hands and seals, which being in the possession of the plaintiff the defendant cannot more fully set forth the same in respect to the said matters so referred to as aforesaid, and thereby found that there was due to this defendant from the plaintiff the sum of £202, which sum they by their said award directed to be paid by the plaintiff to this defendant, and the said arbitrators by their said award found and directed that the said plaintiff should pay to the defendant his costs of the said action, and all costs incidental to the said judgment and execution, but in consequence of the said arbitrators not being aware of the amount of such costs, and in ignorance and misconception of the amount thereof, and in consequence of this defendant and the said plaintiff being ignorant and unable to state the exact amount of such costs, and the said arbitrators and the parties to the said reference believing that the same did not exceed the sum of £6 5s., they only awarded and directed this plaintiff to pay that amount to this defendant in respect to such costs and incidental expenses, although it was the intention of the said arbitrators at the time of the making of the said award, and they did then intend to direct by the said award, all such costs as this defendant had incurred in the said action, and by the recovery of the said judgment, and the said execution and incidental expenses thereon, with the acquiescence of the plaintiff, and the approbation of this defendant, both of whom then laboured under a mistake, and were ignorant of the exact amount of said costs and incidental expenses, and were also ignorant that the same exceeded the sum of £6 5s., but being ignorant of the exact amount, and intending to award the full amount of such costs and incidental expenses, they, the said arbitrators, by mistake and in misconception of the amount of such costs, contrary to their intention, only awarded to be paid by the plaintiff the said sum of £6 5s.; and the defendant further says, that at the time of the execution and delivery

of the said release there was due to him from the plaintiff, in respect to the said costs and expenses incidental to the said writ, a much larger sum than the said sum of £6 5s., but the defendant or the plaintiff were not aware thereof until after the execution of the said pretended release, and the same at that time amounted to the sum of £15, but the defendant was ignorant thereof at the time of the execution and delivery of the said pretended release, and relied entirely upon the representations made to him by the said plaintiff and the said arbitrators that the said costs did not exceed the said sum of £6 5s., by whom he was assured that the same did not exceed that sum, and by whom he was assured that if the said costs and incidental expenses should afterwards be found to exceed the said sum of £6 5s., he, the said plaintiff, would pay and discharge such excess: that relying on such representations and assurance, and then in ignorance and misconception of the amount of such costs and incidental expenses, and without any neglect on his part, and upon the solicitation of the plaintiff, without which representation, solicitation, and assurance, he, the defendant, would not have executed the said release or delivered the same, he, this defendant, then executed the said pretended release upon such representation and assurance, and then upon the representation and assurance aforesaid delivered the same to the plaintiff, and the plaintiff then also in ignorance of the said facts, and by misconception, accepted and received the said pretended release: that shortly after the execution and delivery of the said pretended release the said defendant discovered the said error and mistake, and that he had in misconception and ignorance of the amount of the said costs and incidental expenses executed and delivered to the plaintiff the said pretended release, whereupon he requested the said plaintiff to pay the said difference between the amount so awarded and the amount in reality due of the said costs and incidental expenses, and the plaintiff then agreed with the defendant to do so, and that he would forthwith discharge the said difference to the said sheriff, who until then, and until the pretended seizure in the said count mentioned, held the said execution; and the plaintiff then and frequently thereafter

admitted his liability to pay the said difference, and also his liability by virtue of the said execution to pay the same according to the said understanding at the time of the execution and delivery of the said pretended release, and more particularly he has made such admissions in conversations had with this defendant and others; but the said plaintiff now fraudulently, and contrary to the understanding between him and this defendant at the time of the execution and delivery of the said pretended release, and in fraud of such understanding, afterwards pretended, and now insists that the said pretended release discharged him from liability in respect to the said difference of the said costs and incidental expenses, and this defendant submits that under the circumstances hereinbefore mentioned the said pretended release should not, as it was the intention it should not, have the effect of such discharge or operate as such; that afterwards, and with the acquiescence of the plaintiff, and after being frequently requested to discharge the said difference between the amount of such costs so directed to be paid as aforesaid by the said award, and the sum afterwards found to be actually due as aforesaid from the plaintiff to the defendant, he, the said sheriff, at the instance of this defendant, and in order to obtain satisfaction of the difference between the amount so awarded for such costs and incidental expenses as aforesaid and the sum actually due by the plaintiff to the defendant under the said execution, and in accordance with the intention of the said arbitrators at the time of the making of the said award, and in pursuance of the said understanding between the plaintiff and the defendant, made the alleged seizure in the said count mentioned, as this defendant submits and insists he lawfully might, to obtain such satisfaction of the said balance of the said costs and incidental expenses.

The plaintiff demurred to this rejoinder, assigning, among other causes of demurrer, that the defendant by his said rejoinder attempts to avoid the said release mentioned in the said replication by representations alleged to have been made by the plaintiff and others to him, the defendant, at the time of the execution and delivery of the said release, con-

trary to and in variance with the legal effect of said release, which he cannot do. That it is not shewn in the said rejoinder, or alleged therein, nor does it appear therefrom, that the alleged greater sum of costs being due the defendant by the plaintiff would have prevented, had the defendant known of it, his executing the said release, or that the amount of the said costs were material in any way to the defendant executing said release. That the facts alleged in said rejoinder would, if true, only entitle the defendant, if to any relief, to have the said deed of release reformed, so as to except thereout or from the effect thereof the balance of the said costs over and above the said sum of £6 5s., and that the defendant could not, while the said release is in force as it is, restrain or prevent the plaintiff from acting upon it. That the facts alleged in said rejoinder do not disclose such an answer to the plaintiff's said replication as entitles him to plead equitably in a court of law.

The defendant joined in demurrer, and gave notice of the following exceptions to the plaintiff's replication to the second plea:—that the said replication is a departure from the said second count of the declaration, and tenders an issue wholly different from that arising out of the said count, and shews that the cause of action as stated in the said count is wholly different from that pretended to be alleged in the said replication. That the said replication shews that the cause of action of the plaintiff, if any, is not in trespass, but in assumpsit, and no breach of the said alleged release is assigned in said replication. That it is not alleged in said replication that the supposed trespasses in said count mentioned were committed before or after the execution of the said alleged release.

McCarthy, for the plaintiff, cited *Stor. Eq. Jur. secs. 140, 142, 144, 151, 246*, *Okill v. Whittaker*, 1 DeG. & Sm. 83.

Blevins, contra, cited *Lady Arundel v. Phipps*, 10 Ves., 139; *Broughton v. Hutt*, 5 Jur. N. S., 231; *Bilbie v. Lumley*, 2 East. 469; *Higgs v. Scott*, 7 C. B., 63; *Sargent v. Wedlake*, 11 C. B. 732; *Luce v. Izod*, 1 H. & N. 245.

ROBINSON, C. J., delivered the judgment of the court.

The demurrers that have been filed bring up the question whether the declaration is sufficient.

The second count is an ordinary count in trespass, and must be sufficient, except that, according to the copy of it as given in the demurrer book, it does not aver that the goods seized, &c., belonged to the plaintiff.

But the special plea of justification to that count would cure any exception on that ground, for it justifies the taking of the goods under an execution against the plaintiff, and impliedly admits that the goods were his.

As to the first count, which is special, it states a sufficient cause of action. It does not, it is true, allege that the seizure of goods which is complained of as wrongful and malicious, took place after the judgment and execution, and the debt due upon them by the plaintiff had been released by the defendant, but the statement amounts in substance to that, for after stating the release the plaintiff says *yet* the defendant maliciously caused the writ of *fi. fa.* to be executed, which is the same thing as saying that, notwithstanding the *defendant* had released the debt, he proceeded to enforce it by execution, and we must clearly understand by this that he did so after the release. Besides, the defendant's equitable plea in defence cures any such objection, because it plainly shews that the defendant did procure the goods to be seized after the judgment had been released, and the defendant tells us why he did so.

Then, the declaration being sufficient, has the first count been well answered by the defence set up on equitable grounds? We think not, because by that plea the defendant shews that upon the ground that the arbitrators had made a mistake in their award which otherwise would certainly not have left him at liberty to act upon his judgment, and upon the further ground that if he had known of the mistake committed by the arbitrators he would not have executed the release, he, the defendant, took upon himself to act in total disregard of the award, and of his own release; and he assumes that in consequence of the mistake of the arbitrators, and of his own ignorance, inattention and mistake, he

had in equity a right to go on and act upon the execution, and sell the plaintiff's goods as if there had been no award between the parties, and no release of the judgment in consequence of the award.

We cannot admit that in the view of a court of equity, any more than a court of law, the defendant could thus take the law into his own hands. He was clearly a trespasser in what he did. No fraud is imputed to the plaintiff in obtaining the award. Nothing is rested upon but the fact that the arbitrators mistook, or, in other words, were not correctly informed of, the amount of costs due upon the *fi. fa.*, of which the defendant himself could best have given them the particulars.

Courts of equity have no peculiar jurisdiction in setting aside awards under the statute of W. III., but if they had, the defendant should have moved against the award in time. Instead of that, without applying to any court, he assumed that the award *could* have been set aside on account of the mistake in a few pounds; and, secondly, that it would have been set aside if he had applied, and then, without applying, he takes law and equity into his own hands, and proceeds with his execution, notwithstanding the award and the release.

If a court of equity would have restrained an action for the defendant's wrong in so acting, which we have no idea they would, they would hardly have done so without imposing some terms upon the facts stated in this plea, and we therefore think clearly we cannot take this to be a good equitable plea under the statute.

Then as to the replication to the second count, the defendant meets that by a rejoinder on equitable grounds, to which the plaintiff has demurred; and the defendant in arguing the demurrer has taken exceptions to the replication, which, like those taken to the declaration, are quite incapable of being supported; and we cannot but remark on what seems a strange course taken on the defendant's side, in taking exceptions for which there is not a shadow of ground, first, to the first count of the declaration, because it does not aver that the release was under seal, when in fact that is stated in plain terms, and so also in objecting to the replication to the second plea to the second count, that it does not state

that the release was given before the goods were seized, whereas that is clearly stated in the replication.

There is no question whatever that if a plaintiff cause a defendant's person or goods to be taken in execution upon a judgment which has been satisfied or released, he is liable in trespass for so doing; and the equitable rejoinder to the replication to the plea to the second count is in our opinion clearly bad, for the reasons stated in regard to the equitable plea to the first count.

The two pleadings are not in all respects the same, but both are liable to the same substantial objections.

We cannot imagine that a court of equity would so far sanction the conduct of the defendant in enforcing his execution for the reasons stated, as to protect him against an action brought for making so clearly illegal a use of the process of a court of law.

We think the plaintiff should have judgment upon the demurrers.

Judgment for plaintiff on demurrer.

VIDAL V. FORD.

Appeal from C.C.—Equitable defence—Perverse verdicts.

Action by payee against the maker of a note. *Plea*, on equitable grounds, that the plaintiff was the captain of a rifle company, organised according to law: that defendant, being a member of it and a tailor, was employed to make the uniforms, which it was agreed between the plaintiff and defendant should be paid for out of the moneys coming to the said company for their drills according to the statute: that in order to raise the necessary sum at once it was also agreed that a note should be discounted, to be reduced from time to time by the moneys so received, and renewed, until paid off: that in pursuance of such agreement a note was made by defendant payable to plaintiff, which was discounted, and reduced by payment of the money derived from the first ten days' drill, and renewed by the note declared upon, which it was understood should be in the same way reduced, and renewed or paid off, by the proceeds of the second drill: that before said drill the plaintiff wrongfully disbanded the company, so that they were unable to draw any more pay, whereby, owing to the plaintiff's wrongful act, it became impossible to perform said agreement and retire said note.

Held, per Burns, J.—that the plea afforded no defence.

The plaintiff, instead of demurring, took issue upon this and other pleas, and three perverse verdicts had been rendered for defendant in the court below, the last verdict being general, though upon the other issues the plaintiff was clearly entitled to succeed under the evidence. On appeal this court ordered a new trial, *Burns, J.*, remarking that, to avoid expense, the defendant might, if he desired it, consent to a verdict for the plaintiff on the other issues, and allow him to move for judgment *non obstante* on this.

APPEAL from the county court of Lambton.

Declaration by plaintiff, as payee, against defendant as maker of a note for \$320, dated 4th December, 1857, payable two months after date.

Pleas.—1. *Non fecit.* 2. That the note was made for plaintiff's accommodation, and without consideration. 3. Set-off. 4. On equitable grounds, that long before the making of the said note in the declaration mentioned, the plaintiff was the captain of a certain rifle company, organised according to law, at Sarnia, in said county: that the defendant being a member of said company, and a tailor by trade, was employed to make up and procure the uniforms and outfit for said company: that it was agreed between the plaintiff and the defendant that the said uniforms and outfit should be paid for by the money coming to the said company for their drills and services according to the statute, and that as fast as said moneys came in they should be so applied; and also, inasmuch as it would take some time to raise the amount required, being, to wit, the amount of the said note, it was also agreed, in order to raise the necessary amount immediately to procure the said uniform and outfit, that a note should be discounted for that purpose, which should be reduced from time to time by the amounts of money aforesaid when they were so respectively paid in, and that the said note should be renewed for the balance due for the said uniforms and outfit, and so on until the whole was paid for; and that the said note should be made by the defendant, as he was the person procuring the said uniforms and outfit, payable to the plaintiff, or order, as the plaintiff was the captain and principal man acting for and on behalf of the said company, in procuring said uniforms and outfit as aforesaid; and that, in pursuance of said agreement, he, the defendant, did make his promissory note, payable to the plaintiff's order, at the agency of the Bank of Upper Canada at Sarnia, at a certain time therein specified, and that the plaintiff endorsed the same pursuant to the said agreement: that the said note was discounted at said bank for said purpose, and the proceeds applied in procuring said uniforms and outfit, said note to be renewed as aforesaid until the men comprising said company should

be enabled to draw the money aforesaid from the government after each regular ten days' drill, according to law. And the defendant says that after the first ten days' drill the money accruing due to the said company was paid, at the instance and request of said plaintiff, in part liquidation and renewal of said note: that the said note was retired, and a new note for the balance thereof, being the note in the declaration mentioned, deposited in the said Bank: that it was then understood as aforesaid between the plaintiff and defendant, that the said last mentioned note should be paid out of the money to accrue due to the said company after the second ten days' drill, or renewed for the balance thereafter remaining due, and after the inspection of said company by the proper officer according to law: and the defendant avers that before the completion of the said drill, and before the inspection of said company by the proper officer thereunto appointed, he, the plaintiff, wrongfully disbanded and disorganised the said company, whereby the said company was unable to draw the said allowance of one dollar per day for each man for drill, or any part thereof, whereby it became impossible, through and by reason of the plaintiff's own wrongful act, to perform the agreement above mentioned, and to retire the said note pursuant to the same.

The plaintiff took issue on the defendant's first, second, and third pleas, and replied to the fourth plea, that no such arrangement or agreement as is therein set forth was ever made between the plaintiff and the defendant.

The case having been tried three times in the court below, resulted on each occasion in a verdict for the defendant, and the learned judge declined to grant the last application for a new trial, remarking that his refusal would give the plaintiff an opportunity to appeal, and that he might have demurred to the fourth plea, and thus saved much trouble and expense.

The plaintiff appealed from this judgment discharging his rule.

Richards, Q. C., for the appellant.

M. C. Cameron, contra, cited *Foster v. Steele*, 3 Bing. N. C. 892; *Swinerton v. Marquis of Stafford*, 3 Taunt. 232.

ROBINSON, C. J.—It cannot be said that the equitable plea was proved. The evidence given with that view comes far short of supporting it. The only ground for doubt in disposing of the appeal is, that there having been repeated verdicts in favour of the defendant the judge thought it inexpedient to grant another new trial, although he was clear that the plaintiff ought to have succeeded.

In declining to set the verdict again aside as being contrary to evidence, he exercised, it may be said, a discretion which undoubtedly belonged to him, and it is unusual under such circumstances to interfere. He reports, however, that he took that course because he wished to have his view of the case, and his estimate of the evidence, submitted to a higher court before further expense was incurred, and there would have been no use in taking that course if the case could not again come before a jury.

I think the judgment should be reversed without costs, and a new trial granted, costs of the last trial to abide the event.

BURNS, J.—It is a pity that the plaintiff had not, as the judge of the county court remarks, demurred to the fourth plea, and then he would have been saved all the expense which has been incurred in the case. The evidence given by the defendant did not by any means sustain that plea, and when we look at the plaintiff's evidence that proves just the reverse of what the plea asserts. The verdict of the jury is without evidence to sustain it, and perverse.

Then, supposing the plea to be true in fact, the next question is whether it is such an equitable plea as this court can give effect to. The plea, first of all, sets up an agreement whereby the note originally given was to be renewed from time to time, and reduced by the amount of money which should be paid to the men by government for their pay, and should be kept going on until it should be paid. The note

sued on is a renewal of the original note, and the plea alleges the agreement also applied to it. If the plea had rested upon that statement, yet it would not be held a good equitable defence which a court of common law could act upon. The rule laid down in *Flight v. Gray*, (3 C. B. N. S. 320,) is that the provision with regard to equitable defences only enables the defendant to plead by way of equitable defence such facts as would entitle him to absolute and unconditional relief in a court of equity. The provision, says Cockburn, C. J., "only applies where this court can deal out the same measure of justice between the parties as the court of equity would do." When the machinery of a common law court cannot carry into effect what a court of equity might think right to do with respect to the renewing of notes, then the equitable defence is inapplicable.

The defendant in this case does not rely upon the agreement to renew as being his defence, but he says the plaintiff disbanded the company, by means of which the rifle company was unable to draw further pay, and by that means it became impossible to perform the agreement. Now the consideration for the note stands admitted, and the plea therefore does not shew failure of consideration. It simply sets up the non-performance of one agreement, if any such can be inferred, as a reason why defendant should not perform his agreement. But, further, the plea does not state that the plaintiff ever agreed, if he could have done so, that the company should be kept together and perform drill enough to furnish the means to pay the note. The plea forms no equitable ground why the defendant should not pay his note.

This being so, we must then see what we can do to relieve the plaintiff against three unjust verdicts. The verdict is general, and perhaps it is fortunate for the plaintiff that it is so, because there is not the same difficulty presented that there would have been if the verdict had been confined to the fourth plea in the defendant's favour. The defendant by his first plea has denied the making of the note. Now the verdict upon that is contrary to law and evidence. It should have been for the plaintiff, for the defendant admitted the

making of the note. The second plea is that the note was made for the plaintiff's accommodation. There was not a word of truth in that. It was for the accommodation of the rifle company, if it was not for the defendant's own accommodation. The verdict should have been entered for the plaintiff upon that issue. The third plea is a set-off, and upon that plea the verdict should have been entered for the plaintiff, for there was no pretence that the amount paid over equalled the plaintiff's claim. The defendant, to entitle himself to a verdict on the set-off should have confined his plea to the sum he could prove, and not have covered the whole of the plaintiff's claim. As this record stands before us there are three issues upon it which have been found against law and evidence in the defendant's favour, upon which there can be no doubt the plaintiff should have succeeded. And if the plaintiff had a verdict upon those, and three or any number of juries should persist in finding the fourth plea in the defendant's favour, it would notwithstanding have been competent to the plaintiff to have applied to the court to enter judgment *non obstante*, and thus have taken the opinion of the court upon the validity of the fourth plea as a defence. The verdict being general in the defendant's favour upon the whole record, the plaintiff cannot take that course.

If the fourth plea afforded a legal defence to the action, then, although a verdict were given against the plaintiff on the other issues, we should not interfere, for it would only be a question affecting a portion of the costs, and the defendant might at once have set that matter right by consenting to have the verdict entered for the plaintiff on those issues. The verdict however being found for the defendant generally, precludes the plaintiff from moving for judgment *non obstante*. I think the plaintiff should not be placed in this position, and he has still, though he denied the truth of that fourth plea, instead of demurring, a right to the judgment of the court, whether it be a legal defence, even after the jury has pronounced it to be true. To enable the plaintiff to present fairly the matter to the court there should be a new trial, in order that the verdict may be correctly entered.

The defendant may, however, if he wishes it, consent to the verdict being entered for the plaintiff on those three issues, and may consent that the plaintiff may move the court for judgment *non obstante* on the fourth plea, and thus avoid much expense instead of going to another trial; but I suppose the spirit of litigation is too strong to consent to any thing that is reasonable, or will give the courts the least trouble in the administration of justice.

This plea upon equitable grounds with the other pleas could not have been allowed without the sanction of the court upon application to be allowed to plead it, and if the matter had been considered upon that application, much of the trouble and expense to these parties would, I think, have been avoided.

McLEAN, J., concurred.

Appeal allowed.

CLAPP V. HAIGHT.

Highway—Conveyance of old road by surveyor—Right to convey—Uncertain description.

In ejectment for land described as being formerly a public highway from W. to C., it appeared that before 1835 there had been a trespass road between those places, running across defendant's lot. In that year a road was laid out and sanctioned by the quarter sessions, intended as a substitute for the former one. Defendant then inclosed a portion of the old road, and had been in possession of it for more than twenty years, but a small piece remained not inclosed, and the plaintiff claimed this under a deed which he received from the surveyor of highways in 1837, purporting to convey to him "the public highway or road from W. to C.," as described by metes and bounds.

Held, that the surveyor had no right to sell the old road, as it was not a public road allowance nor a legal highway, and that the plaintiff, therefore, could not recover.

Semble, that the description in the deed to the plaintiff, set out below, was too uncertain to convey any thing.

EJECTMENT for a small piece of land in the township of Hillyer, formerly being the public highway or road leading from Wellington to the Carrying Place, described in the writ by metes and bounds.

The plaintiff claimed title under a deed to him executed by Stephen Niles, surveyor of highways.

The defendant, besides denying the title relied on by the plaintiff, claimed under twenty years' possession and upwards held by him and his ancestors.

At the trial, at Picton, before *Hagarty, J.*, it appeared that, before 1835, (but how long before was not shewn,) there had been an old road running in an irregular manner from Wellington towards the Carrying Place, across a corner of lot seven, and across the whole of lot eight, which latter was owned by the defendant, in the township of Hillyer. It was not on any public allowance for road laid out by the government, nor was there any proof given that it was a highway laid out by the court of quarter sessions, or had acquired the character of a legal highway under or by virtue of any statute or otherwise. For all that appeared on the trial, it was a road used merely for convenience, and such as is commonly termed a trespass road. It was very crooked, following the most favourable ground. In 1835, upon a petition to the quarter sessions, a road was laid out and sanctioned by the court, leading in a straight line across the defendant's lot eight, and intended as a substitute for the crooked road that had been in use.

The defendant was at that time living on lot number eight, and had been in actual occupation of it ever since. When the new road was laid out by the quarter sessions, he placed a fence on the south side of it, across his field, which inclosed within the field the old road, which had run in that part through his lot, and of this portion of his land which had been occupied by the old road he had been in exclusive possession undisturbed ever since, including a period of far more than twenty years before this action. The plaintiff, on this evidence being given, abandoned his claim to that portion of the line of the old road. But he claimed the rest of the land which had been covered by the old line of road, where it ran through the defendant's lot eight, maintaining that as to that the defendant had not held possession against him for twenty years, and that his deed from the surveyor of highways, made on the 4th of May, 1837, entitled him to recover in this action for that small piece, which was stated to be a mere fraction of land adjacent to the new highway, on the north side of it.

The defendant's answer to the claim was that the surveyor of highways had no right by law to sell it to the plaintiff, for

that it was not such a public road allowance as the surveyor had a right to sell by the statutes then in force ; that if the surveyor could have sold it, he should have offered the defendant the refusal of it before he sold it to the plaintiff, a stranger to the lot, and who owned no land adjacent to the small piece in question : that the description in the surveyor's deed was too vague to enable the deed to operate ; and that, whatever might be the plaintiff's right under such deed, he had lost it by never having taken possession of it, and having left the defendant to enjoy it with the rest of his land for more than twenty years.

As to the possession of this small piece of land, the defendant did not put up a fence between the new highway, when it was laid out by the quarter sessions, and this small piece of his lot, which had been occupied by the old road, and which was adjacent to the new road on its north side. It was immediately at the end of the defendant's house ; and the fence which had been up between the old road, on its north side, and the defendant's land north of it, was left in its old place, thus leaving the little piece in question an uninclosed space between the new highway now used, and that laid out in 1835, and the defendant's fields.

The plaintiff, under these circumstances, claimed it as being covered by his deed from the surveyor of highways, alleging that he had not been dispossessed of it in such a manner as to bar him.

The surveyor's deed to the plaintiff was made on the 4th of May, 1837, in consideration of £4 paid by the plaintiff. It granted this land as being "the public highway or road leading from Wellington to the carrying place," and described it thus: commencing at the base line in front of lot No. 7, then on a north-westerly course along the north easterly edge till it intersects the limits between lot No. 8 & 9; thence south 20 degrees east to the southern limits of said road, thence along the south-westerly edge of said old road till it intersects the base line in front of lot No. 7; thence along said line to the place of beginning," with the exception of what is occupied by the main road, meaning by the new quarter sessions road, which traversed the old road on defendant's lot No. 8.

The objection made to this description was that it granted nothing certain. Leave was reserved to move to enter a nonsuit, and the jury found for the plaintiff.

Wallbridge, Q. C., obtained a rule *nisi* accordingly. He cited *Mayor of Salford v. Ackers*, 16 M. & W. 85.

C. S. Patterson shewed cause, and cited *Attorney-General v. Chambers*, 33 L. T. Rep. 189.

ROBINSON, C. J., delivered the judgment of the court.

Though the deed does not state in what concession, or even in what township, the piece of land is, yet we think, if by following up the old line of road from Wellington to the Carrying-place, (supposing the traces of it can yet be seen, or the line ascertained,) we come to lots numbered 8 and 9, then we can apply the description. But we do not see that we could hold the deed to convey more than the actual track of the old road, as it had been up to that time travelled, for not being a public allowance, nor any road laid out by public authority, we cannot tell that any specific width belonged to it as a highway. The public had merely used what they wanted. There was no evidence that statute labour had been performed on the old road, or public money expended on it, either before 1810 or afterwards.

We should have difficulty, we think, in holding that the deed made by the surveyor of highways was sufficiently certain in the description to convey any thing that could now be clearly made out, but it is of no consequence to determine that point, for we are of opinion that the surveyor of highways had no right to sell the land, for it was not a public allowance, and was not even a legal highway in any sense of a highway: that is, it was not proved to have been laid out by the quarter sessions, and there can be no doubt it was not, for a road of that zig-zag description could never have been laid down by a surveyor as intended to be a permanent road. Neither was there any evidence that it had become a highway by any of the means by which it might have acquired that character under the statute 50 Geo. III., ch. 1.

We make absolute the rule *nisi* for entering a nonsuit.

Rule absolute.

MCLEOD AND MCINTYRE V. FORTUNE, SHERIFF, ET AL. (a)

A person who indemnifies the sheriff for seizing goods, does not by that act become liable as a trespasser.

This was an action for seizing goods, tried at Cobourg, before *Burns*, J., in which a verdict was rendered for the plaintiffs against all the defendants.

Galt, Q. C., obtained a rule *nisi* to enter a verdict for defendants Ulyott and Carveth pursuant to leave reserved, and for a new trial for the other defendants, to which *Cameron*, Q. C., shewed cause.

The only point which arose, material to be reported, was whether the defendant Carveth could be held liable for having joined in the bond to indemnify the sheriff for the seizure, there being no other evidence to connect him with the sheriff's act.

ROBINSON, C. J., delivered the judgment of the court.

As to the defendant Carveth, we have had some doubt, but our conclusion is that he is not liable, and that a verdict should be entered in his favour.

We have found no authority for holding him a trespasser, merely because upon the claim being made by the plaintiffs he joined in a common indemnity bond to the sheriff, to hold him harmless in selling the property as belonging to the defendants in the *fi. fa.*

No authority has been cited in support of the action under such circumstances against a person in Carveth's position, and we have found none, though there must frequently have been the same ground for an action. It may be said that he caused the sale to be made by giving his bond of indemnity, because without that it probably would not have been made, and that therefore the case is even stronger than a mere direction or assent, for it holds out a promise of indemnity as an inducement to the sheriff to go forward.

On the other hand, the surety in the indemnity bond has no interest in the matter, and therefore, if he can be reason-

(a) Decided in Trinity Term last, but omitted in the reports of that term.

ably held to ratify and adopt the act of seizure, which is the original trespass, he is not ratifying or adopting any thing done for his benefit. He consents merely to add his responsibility to that of the plaintiff in the execution, in case the sheriff shall have been found wrong in his decision upon a contested claim. He neither directs nor counsels the act, nor avails himself of it for his benefit, for he has no concern in it. We fear it would have an inconvenient and injurious effect upon the administration of justice if persons indemnifying the sheriff on either side, in cases of this kind, found that by that act merely they were liable to be treated as trespassers. It would hardly be in the power of the sheriff thenceforward to take that course which courts of justice have frequently pointed out as the course that he ought to have taken. In point of fact, the person who executes the bond, when he does nothing and says nothing to shew that he has any interest or desire in the matter, may be assumed to be entirely indifferent whether the sheriff persists in his seizure or not; he neither directs nor procures the act to be done, and the sheriff is left perfectly free to act as he thinks proper.

Our opinion is that a verdict should be entered for the defendant Carveth.

As to the case against the other defendants, the amount recovered by the verdict is large, but there is no doubt about the ability of the defendants to pay it, if it is justly due, so that there is no danger of loss by any delay that may arise from the necessity of further investigation.

There are several points which are left doubtful upon the evidence, and considering the strange discrepancy between the accounts given by William Maur of the transaction at different times, and the statements in the evidence, and in the many affidavits that have been filed, we think we should grant a new trial that the matter may be more fully investigated; but we have not formed the opinion that the plaintiffs are not entitled to recover, and possibly to the amount of the verdict, and we say this that it may be understood that the case will go to trial without prejudice from any supposed conclusion of ours in regard to the merits.

New trial, costs to abide the event.

MCLEOD AND MCINTYRE V. FORTUNE, GARNETT, MARMION,
ULLYOTT, AND CARVETH.

Bill of sale—Affidavit of bona fides and of execution—Assignment of judgment—Satisfaction—Subsequent sale.

Where a bill of sale was made to two jointly, and filed on an affidavit of *bona fides* made by one, but the evidence shewed that the consideration was made up of two debts, due to the vendees separately. *Held*, sufficient.

Held, also, no objection that the affidavit of execution did not state the date of the bill of sale or on what day it was executed.

The sheriff held an execution against A., B., and C., upon a note on which C. was the last endorser, and the others therefore liable over to him. Goods belonging to A. having been seized, C. paid the bailiff £100, part of the debt, and the sheriff accepted and paid a draft by the plaintiffs' attorney for the whole; on the same day that this draft was accepted the bailiff took an assignment of the judgment, and afterwards sold the goods under a *ven. ex.*, when they were bought by C., and out of the purchase money the bailiff paid the balance due to the sheriff.

Held, that the payment made by the sheriff had satisfied the judgment, and that the sale therefore was illegal.

ACTION for taking and converting to defendants' use a schooner belonging to the plaintiffs, with the rigging, sails, anchors, and other equipments, and also a quantity of timber and planks.

Defendants pleaded—1. Not guilty.

2. That the schooner, &c., did not belong to the plaintiffs.

3. That the plaintiffs were not possessed of the schooner, &c.

4. A justification under a writ of *fi. fa.* in a case of *Fergusson v. William Manson, Donald Manson*, and one of these defendants, Garnett, and a *venditioni exponas* issued upon a return to such writ.

It was stated in this plea that to the *fi. fa.* defendant Fortune, as sheriff, had returned that he had seized certain goods and chattels of the three defendants in the writ, of the value of £30, which goods remained in his hands unsold for want of buyers, and that he had no more goods: that a *ven. ex.* therefore issued, directing the sheriff to sell the goods so seized, which writ of *ven. ex.* was endorsed with a direction to levy £111 11s. 11d., besides costs, &c.: that under the *fi. fa.* and *ven. ex.* the defendant Fortune, as sheriff, and the other defendants as his servants, by his command seized and sold the said goods, &c., mentioned in the declaration, as it was lawful for

them to do, such goods being the property of the three defendants in the said writs, or of some or one of them, and not being the property of these plaintiffs as alleged, which are the said supposed trespasses in the declaration mentioned.

To this plea the defendants replied:—1. That the said goods, &c., were not the property of the execution debtors, or of any of them, but belonged to these plaintiffs.

2. That the judgment in that plea mentioned, at the time of the goods being seized and sold, was paid and satisfied.

The defendants took issue on the replications.

At the trial at Cobourg, before *Hagarty, J.*, the plaintiffs proved a bill of sale made to them by William Manson, under seal, dated the 31st of October, 1857, by which, in consideration of £261 1s. 3d., recited to be a debt due by William Manson to the vendees, he, Manson, sold to them the hull of the vessel in question, then being built at Port Hope by the said Manson, and all the timber and materials then got out for the purpose of completing the same, consisting of plank, knees, and sawed and unsawed lumber. This was filed with the county clerk on the 3rd of November, 1857.

It was objected, on the part of the defendants, that the evidence shewed the consideration of £261 1s. 3d. in this bill of sale, to be made up of two debts due by the vendor, W. Manson, one of them to the plaintiff McLeod of £77, and the other to McIntyre, the other vendee, of £183 16s. 9d., but that they were not shewn to be partners, and yet that the bill of sale stated the whole consideration as if it were a debt due to the vendees jointly; and that under such circumstances the affidavit of McLeod alone, (upon which it was registered,) that the sale was *bonâ fide*, and upon good consideration, as set forth in the conveyance, and not for the purpose of enabling the bargainees to hold them against the vendor's creditors, was not sufficient.

It was objected also that the affidavit made by the subscribing witness was insufficient, because it did not state the date of the bill of sale, or on what day it was executed.

The learned judge overruled those objections, not looking upon the defendants as in a situation to raise them, as the want of registration (if there were any thing in the objections)

would make the bill of sale void only as against creditors, or subsequent purchasers or garnishees, and none of these defendants stood in that position.

The plaintiffs next gave evidence in support of their replications, chiefly for the purpose of shewing that the defendants could not justify under the execution against Manson, because that execution had been fully satisfied before the property in question had been sold under it.

It was proved by the plaintiffs that Garnett, one of the defendants in the execution of Fergusson against William Manson, Donald Manson, and Garnett, had been sued as endorser in the same action with the two Mansons, who were liable before him as maker and prior endorser on the same note: that Marmion, one of the defendants in this suit, was the sheriff's bailiff who seized the property in question, early in March, 1858, under the *fi. fa.*, and sold it under the *ven. ex.*: that a few days after he had seized, and before the sale, Garnett, one of the defendants, paid him £100, the sum due upon the execution being then £123 16s. 8d., and that after the £100 had been so paid, and in consequence of some communication between Marmion, the bailiff, and the sheriff, Fortune; the attorney of Fergusson, the execution plaintiff, drew upon the sheriff in favour of Fergusson for \$468, being the whole amount due upon the *fi. fa.* after deducting a small sum in which Mr. Mowatt, the plaintiff's attorney, was indebted to the sheriff. This was on the 17th of March, 1858. The draft was at three days' sight, and was paid by the sheriff at maturity, and this defendant, Marmion, his bailiff, on the 29th of March, paid over to the sheriff the amount necessary to discharge the execution. On the 17th of March, the same day that the sheriff accepted the draft in favour of the plaintiffs' attorney, Marmion, his bailiff, took an assignment of the judgment from Fergusson as for the sum of £123 15s. 8d., paid to him by Marmion for the purchase of the judgment, and afterwards, on the 3rd of April, 1858, Marmion put up the schooner and other property for sale under the *ven. ex.*, and sold it for £30 to Ullyott, one of the defendants, who it was plain upon the evidence bid her off for the other defendant Garnett.

Garnett was examined as a witness for the plaintiffs, and admitted, as Marmion also swore, that he, Garnett, was the person who urged on the sale, after the plaintiffs' attorney in the *fi. fa.* had been paid the debt and costs in full, and Garnett swore also that his object was to get possession of the vessel, and that the assignment of the judgment to the bailiff, Marmion, was made upon the advice of his Garnett's legal adviser, as a means of protecting him in his payment of the execution, which was against him and the Mansons.

Marmion endeavoured, on his examination upon the trial, to represent the transaction between Garnett and him as if it were a loan of the £100 by Garnett to him, for some purpose of Marmion's own, but it was plain upon his testimony, and Garnett's, that Garnett had supplied the £100 to Marmion to satisfy so much of the execution against him and the Mansons, and that Marmion had so arranged with the sheriff that Fortune was content to pay the whole amount of the execution to the plaintiffs' attorney as if it had been collected on the execution; and afterwards, upon the pretence of enforcing the judgment for Marmion as the purchaser and assignee of such judgment from Fergusson, as if Marmion had advanced the money which was paid to Fergusson, the vessel was allowed by the sheriff to be sold by Marmion under the *ven. ex.*, just as if the judgment were still unsatisfied.

These plaintiffs attended the sale and forbade it. There was no competition, and the result was that the property was knocked down to Ullyott, Garnett's agent, for £30, and Garnett entered at once into possession of the vessel. Marmion received out of the £30 what was necessary to make up the deficiency between the £100 which Garnett had given, and the amount which Marmion had paid to the sheriff.

The learned judge ruled at the trial, that the payment made by the sheriff to the plaintiffs' attorney, under the circumstances that had been proved, discharged the execution, and that he, Garnett, could not through the bailiff take an assignment of the judgment, and enforce it in the name of the plaintiffs, who had been paid their debt, but for the

express purpose of protecting that one of the defendants in the cause (in this case Garnett) who had paid the money to him. He thought such a transaction as Marmion's evidence disclosed was wholly opposed to the policy of the law.

On this direction the jury found for the plaintiff £750, except as against Carveth, in whose favour a verdict was entered by consent. £750 was the sum at which the vessel was valued in May, 1858, by a person who had inspected her. These plaintiffs bought the vessel in October, 1857, when she was on the stocks and in a very unfinished state. The plaintiffs proved that after they bought her for £261 they had expended large sums in completing and equipping her.

Galt, Q. C., for the first four defendants, moved for a new trial without costs, for misdirection, and upon the law and evidence, and for excessive damages.

Cameron, Q. C., shewed cause, and cited *Carr v. Coulter et al*, 2 P. R. 317; *Dowbiggin v. Bourne*, 1 Yourge 111; 2 Y. & C. 462; *Langdon v. Willis*, Lutw. 589; *Speake v. Richards*, Hob. 207; *Waller v. Weedale*, Noy 107.

ROBINSON, C. J., delivered the judgment of the court.

We think the objections were rightly over-ruled that were taken to the plaintiffs' title under the bill of sale, on account of the debts which formed the consideration being separate debts, due to the plaintiffs respectively, and not one debt due to the two, and because the affidavit of *bona fides* was made by one only of the vendees. We think these objections in themselves not tenable, independently of the particular ground on which the learned judge overruled them.

We think also that we ought not to interfere on the ground of the damages being excessive, for the evidence would fairly support a recovery to that amount, and the conduct of the defendants was reprehensible on several grounds. We granted a new trial after the first verdict in favour of the plaintiffs, which was for £600 damages, because, the plaintiffs' title to the ship being denied, a good deal of evidence had been given

upon that issue, and afterwards many affidavits were filed on both sides, which certainly placed the witness, William Manson, upon whose evidence the proof of the transaction respecting the sale of the ship to the plaintiffs in a great measure depended, in a light that, to say the least, required explanation, and made it proper that the case should again be submitted to a jury. We were careful in granting the new trial, however, to state that it was on that account we granted it, and not because we had formed an opinion that the plaintiffs were not entitled to recover, and probably to the full extent of the damages given.

Upon the main question in this case, we are of opinion that, even if the property had been still Manson's, the sheriff acted wrongfully in selling the schooner and other goods on the judgment which Fergusson had obtained against the Mansons and Garnett on the note made and endorsed by those defendants respectively, for that after what had taken place that judgment was satisfied, and Fergusson had been paid his debt. He had no longer a judgment debt to assign, and there is no doubt that when the sheriff paid the whole debt, as he did, to the plaintiffs' attorney, he did so because he chose to give effect to Marmion's arrangement for paying the debt, and Marmion's taking the assignment of the judgment seems to have been an after-thought, and bears too much the appearance of a contrivance to further Garnett's views in getting possession of the vessel, which he did for the trifling sum of £30, because no one would venture to become purchaser at a sale made under such circumstances, or at any rate no one chose so to do.

The case of *Dowbiggin v. Bourne*, (1 Younge 111, and 2 Y. & C. 462,) shews that the sale that was made was illegal, because the judgment had been satisfied, and could not be enforced at the instance of Garnett, for the double purpose, as it seems it was, of giving him a summary method of recovery against the prior parties to the note, and of getting the schooner into his possession.

Under such circumstances as were proved, the sheriff could not be looked upon as acting for the judgment creditor Fergusson, and he was not therefore entitled to dispute the

bona fides of the sale that had been made to the plaintiffs, and the same remarks apply in effect to the other defendants, whose defence depends upon the legality of what the sheriff did.

Rule discharged.

MARGARET SCOULER AND CECILIA McOUAT v. JAMES SCOULER.

Will—Construction—Previous decision of C. P. thereon—Demand of possession—Devise to wife—Ejectment by her alone—22 Vic., ch. 34.

Where the construction of a will had been determined by the Common Pleas, this court held it to be settled by their decision, and conformed to it without expressing any opinion on the question raised.

The plaintiffs claimed under a will giving them a life estate in the land, and the defendant did not hold under them, and by his notice denied their title. *Held*, that no notice to quit nor demand of possession was necessary.

One of the plaintiffs having married since the devise, *Held*, that she was not entitled by the 22 Vic., ch. 34, to sue alone, but that her husband must join.

Quære, as to the effect of that statute upon the husband's right to possession of his wife's land where he is not tenant by the curtesy.

EJECTMENT for the rear half of lot No. 20, in the 10th concession of Lanark.

The plaintiffs claimed title as devisees of Robert Scouler, the grantee of the Crown.

The defendant, who defended for the whole 100 acres, was the eldest son of the same Robert Scouler, and claimed "by right of possession."

At the trial at Perth, before *Richards, J.*, it appeared that the Crown granted the land by patent to Robert Scouler.

He died in November, 1852, having made his will as follows:

"I do leave and bequeath to John Scouler, son of my daughter Margaret, all my real as well as personal estate that I may be possessed of at the time of my demise, the lands and tenements being the rear half of lot number 20, in the 10th concession of the township of Lanark, providing he supports me with sufficient meat, board, washing, and lodging, or causes me to be supplied in the same during the term of my natural life. And further, I order that the said John Scouler's mother, and my youngest daughter

Cecilia, shall have a lien or claim on the said lands and tenements as a home, during the term of either of their natural lives, then after their decease the same shall revert to the said John Scouler, and his heirs for ever."

The plaintiff, Margaret Scouler, was mother of the John Scouler named in the will, and the plaintiff Cecilia was the youngest daughter mentioned in the will.

It was admitted that Cecilia was a married woman at the time of bringing this action: that her husband was still living: that he had never reduced her interest in the premises in question into possession; and that she had never been in actual possession. Also, that this defendant took possession under the testator about nine years ago, and had ever since been in actual possession, making such use as he pleased of the property.

The defendant's counsel objected at the trial that no estate passed to the plaintiffs under the will, nothing at most but a charge in equity: that the will contemplated and intended that John Scouler should enjoy the estate in common with the others named: that if any legal estate passed it was to the devisees jointly during their lives, and one could not recover without the others: that Cecilia's husband should have joined with her in the action; and that the plaintiff was bound to shew a demand of possession before action.

The defendant had leave to move to have a verdict entered for him on any of these objections, and a verdict was rendered for the plaintiffs.

The defendant shewed no right in himself, but confined himself to questioning the title of the plaintiffs. As the will was not denied, he could have no title, for he had not held possession for a time that could bar the devisee under his father's will.

John Scouler, the devisee in the will, brought an action against the defendant, James Scouler, in 1857, to gain possession of the property, claiming under the will, and on the trial of that action, which was depending in the Common Pleas, a verdict was given for the plaintiff, with leave reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that the will gave a life

estate to Margaret and Cecilia, and that the plaintiff, John Scouler, took only a remainder in fee under the will, and no present interest.

The Court of Common Pleas, after argument of the case, determined that the testator's two daughters took an estate for their joint lives, with remainder to the survivor for her life, remainder in fee to the plaintiff in that case, John Scouler, and they directed a nonsuit to be entered. The case is reported in 8 C. P. 9.

The daughters in consequence brought this action to dispossess the testator's eldest son, James, who was still in possession.

Deacon obtained a rule *nisi* to enter a verdict for the defendant pursuant to leave reserved. He cited *Doe Sheriff v. McGillivray*, 6 O. S. 189; *Doe Foley v. Wilson*, 11 East 56; *Williams v. Evans*, 1 E. & B. 727; *Doe Blakiston v. Haslewood*, 10 C. B. 544; *Thornhill v. Hall*, 2 Cl. & Fin. 22, 36; *Greenwood v. Sutcliffe*, 14 C. B. 226; *Coon v. Brook*, 21 Barb. 547; 22 Vic., ch. 34, secs. 2, 19.

Steele, contra, cited *Butler v. Donaldson*, 10 U. C. R. 643; *Woodf. L. & T.* 492; C. L. P. A., sec. 234.

ROBINSON, C. J., delivered the judgment of the court.

There may seem to be room for arguing upon the terms of the will that the daughters were only to have the privilege of living upon the farm as a home jointly with John Scouler if they chose, and that the testator meant that John should have the estate at once, subject to that condition in favour of the daughters; and that the stipulation that he should support the deviser during his life, which would be a condition precedent, fortified that construction, as it seems to shew that John Scouler, who had been allowed to live upon the place before the old man died, was to be allowed to enjoy the property even before the will could take effect, and from thenceforward.

On the other hand, the language of the will, that after the death of the daughters the estate should *revert* to John Scouler, seems to denote an intention that the daughters

should hold the estate for their lives, and there are other reasons that may be given for supporting that construction.

Whatever might be the opinion of this court, we consider the construction of this will settled by the judgment of the Court of Common Pleas, for it would be intolerable that two courts of co-ordinate jurisdiction should in a controversy respecting the same property, arising upon the construction of the same will, insist upon opposite conclusions. If there were no appellate jurisdiction such a course would lead to confusion, and there being a higher court to which the question may be taken, it is obviously proper that we should conform to the judgment given in the Court of Common Pleas until it has been reversed. On that point, therefore, we decide in favour of the plaintiffs.

There was no necessity for proving a demand of possession by the plaintiffs, for it was not shewn that this defendant ever held from or under them. The deviser's death put an end to any tenancy at will that might have been held under him; and besides, the defendant, by denying the plaintiffs' title in this action, disabled himself from contending that he ought to have had notice to quit, or that possession should have been demanded from him.

Then, it is objected to the right of Cecilia to recover, that she was a *feme covert* when this action was brought, being married to one McOuat, and that she cannot sue alone. It was not shewn whether there has been any child born of the marriage, nor whether the husband is living in Upper Canada or not.

This was an estate devised to Cecilia Scouler, as we assume, before the marriage. We see no authority in the statute 22 Vic., ch. 34, for her suing alone in this action of ejectment, but the verdict may continue in force for the plaintiff Margaret Scouler, and judgment be entered for her. The statute 22 Vic., ch. 34, does not seem perfectly clear as to the right of the husband to go into possession of his wife's lands whether acquired by her before or after coverture, unless where he shews himself to be tenant by the curtesy. But at any rate, there is no authority upon the facts shewn for the wife suing alone in this case.

The verdict will be for the plaintiff Margaret Scouler for an undivided moiety of the land, which she has a right to during her life.

PARK V. THE PHOENIX INSURANCE COMPANY.

Insurance—Interest of plaintiff in the property—Double insurance—Second insurance on different interest, and not by plaintiff—Over-estimate of loss—Evidence.

The plaintiff, in an action on a policy of insurance, averred that at the time of effecting the policy he was interested in the property insured: that his interest was before the loss assigned by him to one B., which assignment was accepted by defendants; and that until the loss B. continued interested, and the plaintiff as trustee for him.

Defendants did not demur, but pleaded:—1. That at the time of the loss the plaintiff had no interest; and 2. That before the fire he assigned the policy to B., without having the transfer endorsed, and without defendants' consent.

It appeared that the statement in the declaration was true, that is, that the plaintiff had assigned his interest to B., which assignment was approved by defendants.

Held, that the plaintiff was entitled to succeed on the issue.

The third plea alleged that *the plaintiff* had effected another insurance in the A. Co., without notice to defendants or endorsement on their policy. The evidence shewed that this policy was effected by one S., (whose interest in the property did not appear,) in his own name, and assigned by him to B. *Held*, that the plea was not proved, for the insurance complained of was not shewn to be by or for the plaintiff, or of his interest, which would be necessary to avoid the plaintiff's policy.

In the sixth plea defendants set up as a defence, that after the fire the plaintiff in making his claim had misrepresented and over-stated the amount of his loss, contrary to the form and effect of the condition in the policy. *Held*, that to sustain this plea it was necessary to prove that the over-estimate did not arise from mistake or inadvertence, but was made designedly, for the purpose of obtaining a larger sum than the loss really sustained, or to prevent close enquiry.

Held, that upon the evidence set out below—it being probable that the loss, though over-estimated, was equal to the sum insured, and there being circumstances which might explain the overcharge—that the jury were warranted in finding for the plaintiff.

ACTION on a policy of insurance against fire for £1000, made on the 15th of March, 1856, for twelve months, and renewed till the 15th of March, 1858, on a saw-mill and machinery of the plaintiff, in the township of Nassagaweya.

The plaintiff averred that at the time of making the policy, and from thence till the 1st of May, 1857, he was interested in the said saw-mill and machinery thereby insured to the amount of £2000, and being so interested therein, his interest was, on the said 1st of May, 1857, assigned by him, according to the terms of the policy, to one Levi Beemer, which assign-

ment was notified to and accepted by the defendants: that Beemer continued interested in the said saw-mill and machinery till the time of the fire to the amount of £2000, and that the plaintiff was also interested therein to the same amount as trustee for the said Beemer; and that while such interest continued, and before the 15th of March, 1858, the saw-mill and machinery were burnt down and destroyed by fire, which did not arise from any cause excepted in the policy, whereby the said Levi Beemer, and the plaintiff as trustee for him, sustained loss to the full amount of the £1000 insured. General performance was alleged of all the conditions in the policy to be performed on the part of the plaintiff.

Pleas.—1. That at the time of the loss the plaintiff had no property or interest in the said saw-mill and machinery.

2. That before the fire the plaintiff assigned the policy to Levi Beemer, without having such transfer endorsed upon the policy, and without the consent of the defendants' agent in that behalf, as required by the policy, whereby the policy became void.

3. That after the said policy was effected, and before the loss by fire, the plaintiff effected a certain other policy upon the said saw-mill and machinery, in the Anchor Fire Assurance company, for £500, and that such other assurance upon the said mill and machinery was not made known to the defendants, and mentioned in or endorsed upon the said policy in the declaration mentioned, contrary to the form and effect of the said policy, whereby the said policy became void.

The 4th and 5th pleas denied that notice and proof of the loss were duly furnished as required by the policy. (It was admitted on the trial that notice and proof were given.)

6th plea.—That after the fire the plaintiff, by his agent, Levi Beemer, preferred his claim to the defendants for his loss, and therein stated the amount of such claim to be £3750, and that by reason of the said loss by fire of the said mill and machinery the plaintiff had sustained loss to the amount of the said sum of £3750, when in truth and in fact the plaintiff had not sustained loss by reason of the

premises to the sum of £3750, but to a much less amount, namely, to the amount of £1500 only; and the defendants say that such overcharge is contrary to the form and effect of the condition of the said policy in that behalf in the said policy contained.

7th plea.—That after the fire, and before the commencement of this suit, the plaintiff was guilty of fraud in the premises, contrary to the condition in that behalf in the policy, in this, that “with intent to impose upon the defendants, and to cause and procure them to pay a much larger sum than the loss the plaintiff sustained &c.; the plaintiff, by himself and by his agent, the said Beemer, delivered to the said company a false and fraudulent account of the said alleged loss and damage, &c., in which said account the loss and damage sustained by the fire were represented and stated to be £3750; and the plaintiff, by himself and his said agent, then claimed and endeavoured to obtain payment from the said defendants of the amount of the said policy upon the basis of the said sum of £3750, being the correct amount of the loss aforesaid; whereas in truth and in fact the said loss and damage were of a much less amount, namely, to the amount of £1500 only, as the said plaintiff and his said agent in that behalf during all that time well knew.

8th plea.—That in order to support the plaintiff's claim for the loss in the declaration mentioned, the said Levi Beemer, the plaintiff's agent, on &c., before, &c., made an affidavit in support of the claim for loss, in which affidavit there was false swearing within the true intent and meaning of the condition in that behalf in the said policy, in this, that the said Levi Beemer then swore that by the burning of the said mill and machinery he had sustained loss to the amount of £3750 or thereabouts, in the actual value of the said mill and machinery, as he believed, and that it would cost that amount or thereabouts to rebuild the said saw-mill, and erect similar machinery to that destroyed, whereas in truth and in fact the said loss amounted to a much less sum, namely, £1500, and a much less sum, namely, £1500, would rebuild the said saw-mill, and erect similar machinery to

that destroyed; and the said affidavit did not in these respects contain a true and faithful account of the said loss, to the best of the knowledge and belief of the said Levi Beemer.

9th plea.—That the said mill and machinery, before and at the time of the loss, were also insured in the Royal Insurance Company for £1000, and the Erie and Ontario Insurance Company for £500, which insurances were mentioned in the policy now sued upon, wherefore these defendants are under their said policy liable only for their rateable proportion of the plaintiff's loss.

The plaintiff took issue on all the pleas.

The case was tried at Hamilton before *Robinson, C. J.*, and a verdict rendered for the plaintiff for the full amount insured.

Connor, Q. C., moved for a new trial on the law and evidence, and for misdirection. He cited *Dafoe v. The Johnstown District, Montreal Ins. Co.*, 7 C. P. 55.

Cameron, Q. C., shewed cause, and cited *The Traders' Ins. Co. v. Robert*, 9 Wend. 404; *Tyler v. Ætna Ins. Co.* 12 Wend. 507; *Robert v. Traders' Ins. Co.*, 17 Wend. 631.

The facts of the case are fully stated in the judgment of the court, delivered by

ROBINSON, C. J.—On the trial it was proved that the plaintiff, Park, bought the land on which the mill was erected on the 14th of August, 1855, and that on the 21st of March, 1856, a few days after he effected the insurance with the defendants, he conveyed the land and mill, &c., to Levi Beemer.

At the conclusion of the case made out by the plaintiff, the defendants' counsel stated that the defendants relied upon their first plea, traversing the plaintiff's interest in the property insured; also upon the third plea setting up the defence of a double insurance—namely, that in the Anchor Office—not notified to or sanctioned by the defendants; also, upon the 6th, 7th, and 8th pleas, alleging an over-estimate of the loss.

After all the evidence on both sides had been gone through, it appeared to me that the case stood thus: in regard to the first plea, the plaintiff had in his declaration set out his interest in the property truly, stating that on the 1st of May, 1857, he had assigned the policy to Beemer according to the terms of the policy, which assignment was duly notified, and accepted (or approved) by the defendants, and that from thence to the time of the loss Beemer became interested in the said saw-mill and machinery, and that the plaintiff was also interested therein as his trustee.

The defendants with this statement before them might, and we must suppose would have demurred to the declaration, if they had meant to contend that the facts as set forth by the plaintiff did not entitle him to sue upon the policy, or rather did not admit of an action being sustained upon the policy in his name. Instead of that, the defendants denied in general terms the plaintiff's interest in the saw-mill and machinery, which denial, it appeared to me, ought in fairness to be taken as a denial of the truth of the plaintiff's statement in regard to his interest; and as the facts were shewn to have been as the plaintiff had averred, and were sufficient in themselves to admit of the action being brought in his name for the benefit of Beemer, I considered that no objection lay on that plea, and the evidence given under it.

Then as to the third plea, I was not asked to allow any amendment to be made in the plea at the trial, and the evidence certainly did not support the defence set up in that plea, considering the terms in which it is pleaded. It was not proved that *the plaintiff* had made any insurance in this property with the Anchor Insurance Company. The facts were these. The plaintiff, besides his insurance with defendants for £1000, had effected an insurance with the Royal Insurance Company for £1000, and with the Erie and Ontario Insurance Company for £500, in all £2500, upon this saw-mill and machinery.

The defendants were aware of these insurances, and had sanctioned them. Afterwards, the Erie and Ontario Company becoming insolvent, or being supposed to be so, the policy with them was allowed to drop, and instead of it a policy

was effected with the Anchor Insurance Company for £500. This policy, however, was effected not by the plaintiff, but by one Spraker, in his, Spraker's name; it was effected after the policy now sued upon, *and was assigned to Levi Beemer before the fire happened.* Beemer swore upon this trial that the defendants' agent was informed by him that Spraker intended to insure the property with the Anchor for £500. The agent, Mr. Gillespie, was examined, and swore that he had received notice of the policies effected with the Royal Insurance Company, and with the Erie and Ontario Company, but not of any insurance with the Anchor Insurance Company: that he knew that the property was to be insured to the amount of £2500, but never knew that it was actually insured to that amount. He knew nothing of the Erie and Ontario Company having failed, and did not know but that the policy with them was still subsisting up to the time of the fire.

No explanation, I think, was given at the trial of the nature of the interest which Spraker had insured. At least I have not noted any evidence on that point, though I have an impression that it was stated that Spraker held a mortgage on the property.

With respect to the defence on the ground of over-valuation, the evidence was to this effect. Before this insurance with the defendants took place, the person or persons interested in this mill property were desirous of raising a loan of money upon it, and with that view they had the property valued by two gentlemen, who inspected the mill and machinery and received accounts of the cost of both, and they valued the land at £800, and the mill and machinery at £2950. It was a steam saw-mill on a large scale, and with machinery of a superior description. The report of the value being satisfactory, £3000 was lent upon the security of that and other property.

The plaintiff, when he afterwards applied for insurance to the defendants, inserted, I believe, £3750 in his application as the value of the property to be insured, but the application was not produced at the trial, and it may be that he only stated that verbally or by letter as the value. After the

fire, which totally destroyed the saw-mill and machinery, except the large iron water-wheel, which was much damaged, Levi Beemer made an affidavit respecting the loss, in order to support his claim upon the defendants, in which affidavit he swore as follows: "That the said saw-mill was built, and the machinery therein erected, by George H. Park, about two years since, or thereabouts, and cost the said George H. Park the sum of £3750 of lawful money of Upper Canada, or thereabouts, according to the information given by the said George H. Park to the deponent, and which said information as to the said cost of said mill and machinery deponent has good reason to believe to be correct, and that the said sum of money was the real cost of the said mill and machinery. And I, deponent, further say, that I cannot give any minute detail of the various charges for the said mill and machinery, as I did not build the same, and have not the books of the said George H. Park, and that said George H. Park is not now, nor has been for some months, as far as I, deponent, know, in the said province of Canada, but that I, deponent, verily believe that by the burning and destruction of said saw-mill and machinery I have sustained loss to the amount of £3750, or thereabouts, in the actual value of the said saw-mill and machinery, as I, this deponent, believe that it would cost that sum of money, or thereabouts, to rebuild the saw-mill, and to erect similar machinery to that destroyed.

The fire occurred on the 31st of October, 1857, and this affidavit was made by Beemer on the 11th of November following.

It was proved that the agent and the inspector of the Royal Insurance Company went to Nassageweya after the fire, and inspected the place where the fire had occurred, and got such information as they could of the value of the mill and machinery, and that being satisfied in regard to the value, they recommended the company to pay the £1000, which they had insured, which was accordingly paid.

On the other hand, a respectable iron-founder and machinist was examined on the part of the defendants, who swore that he had never seen the mill, but was requested, soon after the fire, by the defendants and the Royal Insurance

Company to go and examine the premises, and report what he would engage to replace the mill for as it stood before the fire. He estimated that he could do it for about \$6000, if allowed to avail himself of all the materials and machinery that remained there, or for about \$9000 without such permission. He admitted, however, that labour was much higher when the mill was built than it was when he made his estimate. 'This witness' calculation was confirmed by another, who had examined the premises with him.

It was after their report was received that the Royal Insurance Company paid their £1000, and it did not appear that these defendants made any offer to rebuild.

I directed the jury that although the sixth plea relied on the mere fact of over-estimate of the loss as a defence, without alleging it to have been fraudulent or wilful, yet I conceived it to be necessary, even on a plea in that form, to prove that there was a designed over-valuing, with a view to obtaining a larger sum than the actual amount of the loss sustained would entitle the party to recover. I remarked, further, that the seventh plea did place the defence fairly on that ground, and that if they found that plea proved in substance the defendants should have a verdict upon it, but that in determining whether it was true, as that plea stated, that the plaintiff, or Beemer as his agent, had fraudulently over-stated the loss, "with intent to impose upon the defendants, and to cause them to pay a much larger sum than the loss actually sustained," it was material to be considered in favour of the plaintiff, that the sum of £3750 may probably have found its way into the affidavit from the knowledge on Beemer's part who made it of the valuation which had been made at exactly that sum the year before, when money was borrowed on the security of the property, which included, however, £800 for the value of the land, a sum that could not enter into a valuation of the building and machinery to be insured; but still, without that the £2950 was beyond the whole sum which the plaintiff insured, and it was proved that after the valuation referred to a considerable addition had been made to the machinery. And the jury were reminded that there was really no ground for supposing that the plain-

tiff or Beemer intended by over-valuing the property to obtain more than the actual amount of the loss, unless it was clear that such actual loss was less in amount than the £2500 insured, for it was certain that the plaintiff could make no claim beyond that, whatever might be the value of the property. I observed, further, that it was proper, nevertheless, to consider that where the insured in any such case named a larger sum as his loss than it really amounted to, it might have the effect of leading the insurers to be less careful in enquiring into the fact than they would otherwise have been, and that a designed misstatement with such a view would of course be fraudulent. The tendency of my remarks was such as may have led the jury to believe that the evidence did not in my opinion clearly prove either of the three pleas respecting over-valuation in favour of the defendants.

The same remarks which were made upon the defence under the seventh plea applied in a great measure to the eighth plea, which set up false swearing in regard to the amount of the loss as a defence. It could not be said that Beemer had by any means good grounds for swearing that the property destroyed was worth £3750, but he did not swear positively, and he grounded his belief on information he had received from Park, and as it was not at all necessary for entitling the insured to recover the £2500 insured in all the offices that the property destroyed should have been worth £3750, it was for the jury to consider whether Beemer did or did not make the statement corruptly, with intention to mislead.

In regard to the third plea, the jury were told that the evidence showed clearly that at the time of the loss the mill, &c., was insured in the Anchor Office for £500, of which insurance the defendants had not that notice which the policy required, neither was it mentioned in or endorsed on the policy, as according to the terms of the policy would have been necessary if it had been a further insurance effected by the plaintiff. They were further told that what was proved respecting a former insurance in the Erie and Ontario Office for the same sum being known to the defendants, and for which this other insurance had been substituted, did not prevent that condi-

tion of the policy from applying, and that the only ground on which the facts proved in support of the plea might be held not to be a defence, was that the policy obtained from the Anchor Insurance Company was not a policy effected *by the plaintiff*, who held the defendants' policy, but a policy effected by a third party, Spraker, which might well co-exist, as I thought, with the plaintiff's policy, and without notice to the defendants, and yet the plaintiff's policy not be avoided by it, for that I apprehended such conditions to mean that the double assurance must be by the same person, or at least for his benefit. Here it was shewn that the policy from the Anchor Insurance Company, though assigned to Beemer before the fire happened, was not a policy that had been obtained by Park; but the third plea was untrue, for that the plaintiff did not effect that further insurance for £500, and a plea setting up a ground of forfeiture must, I thought, be proved strictly. My impression at the trial was that on this ground only the defence under the third plea failed.

The jury upon this ruling having found in favour of the plaintiff, it was agreed that the defendants should have leave to move upon any objections that they might take to the direction given to the jury.

The condition of the policy prohibiting double insurance without notice was as follows:—"In case the buildings or goods herein mentioned have been already, or shall be hereafter insured by any policy issued from this office, or by any other insurance company, or by any private insurers, such other insurance must be made known to this office, and mentioned in or endorsed on this policy, otherwise this policy to be void, and in such case this office shall be liable only to its rateable proportion of the loss."

The condition in the policy respecting overcharge in the amount of loss was as follows:—after specifying the time within which notice of loss shall be given, and stating that the assured is to deliver in "as particular an account of the loss or damage, signed with their own hands, as the nature of the case will admit of," it is added, "and if there appears any fraud, overcharge, or imposition, or any false swearing, the claimant shall forfeit all claim to restitution or payment by virtue of his policy."

It is specified in the policy "that leaseholders, trustees, mortgagees, and reversioners, as well as landlords, may insure their interests in buildings, provided the nature of the tenure or interest be duly specified."

This case had gone down to trial at a former assize, when the jury gave a verdict for the plaintiff for the full amount insured, and we granted a new trial, because it appeared that a legal notice of trial had not been given, and that in consequence no defence had been attempted at the trial. Upon what did appear, however, on the first trial, and upon the affidavits that were afterwards filed, it did not seem to us probable that there would be found any sufficient reason against the plaintiff's recovery, when the case should come to be fully tried, and we intimated that that was our impression when we granted the rule. The defendants indeed had offered to pay a large portion of the loss, which they would hardly have done if they had thought there was any other fair ground for resisting, except as regarded an alleged over estimate of the amount of the loss.

On the last trial, however, the defendants insisted on several defences, which if successful would be an answer to the whole demand. This no doubt they had a legal right to do, and the case remains to be disposed of upon the evidence that has been given on both sides. As regards the first issue, that at the time of the loss this plaintiff had no interest in the property insured, it is admitted that the plaintiff had in fact assigned his interest both in the property and in the policy to Beemer. It is indeed stated by the plaintiff in his declaration, and the defendants have not objected to the plaintiff's right to recover on that account by demurring to the declaration, but they plead that the plaintiff had no interest; and in the next plea, which they abandoned at the trial, they denied that the plaintiff had had notice of the assignment of the policy, or that the defendants' consent to it was endorsed upon the policy. By abandoning that plea they may be reasonably taken to have admitted that the policy was allowed to be assigned, and that such assignment was made according to the conditions of the policy. Such assignment of a policy when sanctioned amounts in effect to

a contract between the defendants and the assignee, of which, as in the case of assignments of other choses in action, where there is no special provision made by law to the contrary, the assignee can only have the benefit by suing in the name of the assured. So there is no objection in our opinion to the plaintiff's recovery by reason of the alleged want of interest set up as a defence in the defendants' first plea.

With respect to the third plea, in our opinion it cannot be held to have been proved. The condition against double insurance means that there shall not be without the consent of the company a double insurance of *the same interest* by the insured or for his indemnity: that is, by any other person with his knowledge and for his benefit, or in which second insurance the interest has come to and is held by him. If there is any such other insurance subsisting at the same time with the insurance which he has effected, and on which he is suing, it will avoid the policy. Now here the plea was that the plaintiff himself had effected an insurance with another insurance company, which was not true, nor did it appear in evidence *that the plaintiff* had any knowledge of or any interest in the insurance effected by Spraker. The breach of a condition which is to work a forfeiture must, we think, be proved strictly, and it cannot be said to have been proved in this case, if we regard either the terms of the plea or of the condition, or the intent and object of the condition, for it was not only not proved that the plaintiff had effected an insurance with the Anchor Company, as the third plea alleges, but it was not proved that the insurance which Spraker (and not the plaintiff) had effected with the Anchor Company was an insurance upon the same interest, and though neither the words of the condition require that the double insurance, to make it a cause of forfeiture, should be upon the same interest, nor is it so alleged in the plea, yet that is held to be what is meant by such conditions.

As to the 6th, 7th, and 8th pleas, which set up in different forms the defence that the amount of the loss sustained by the burning of the mill and machinery was over-estimated by the plaintiff, or Beemer as his agent, and that in conse-

quence of such mis-statement the plaintiff is disabled from recovering, the first question is whether I misled the jury, by telling them that, in order to support the defence under either of those pleas, it was necessary that the evidence should be such as to satisfy them that the over-valuing did not arise from mistake or inadvertence, but was done either for the fraudulent purpose of obtaining a sum greater than the value of the property destroyed, or with the fraudulent design of leading the insurers more readily to acquiesce in the claim made upon them, and to forbear examining so scrupulously into the actual amount of the loss as they otherwise might have done. I left it to the jury to say what they thought of the conduct of Beemer in that respect, with an intimation that, considering it was not necessary and could be of no use for Beemer to make out the property to be of greater value than £2500, which was the full amount insured, it might be that he had without any dishonest intention adopted the £3750, which had been reported by persons who had valued the property the year before to be its real worth, though no doubt that included £800 for the land which had not been destroyed by the fire; and I observed that £3750 was no doubt much more than the amount of the loss, and that, on the other hand, there was ground afforded by the evidence for concluding that the loss was really not less than £2500, the whole amount insured.

The next question is whether the evidence was such, that the jury, having received the direction which they did, and supposing it to have been a proper direction, ought not to have given the verdict which they did.

We think what was held by me at the trial on this point of over-estimate of the loss was not incorrect, and that the verdict found by the jury on the 6th, 7th and 8th pleas cannot properly be set aside as being against evidence; and that the rule therefore should be discharged.

Rule discharged. (a)

(a) See *The Ramsay Cloth Co. v. Johnstown District Mutual Insurance Co.*, 11 U. C. R. 516; *Lucas v. Jefferson Insurance Co.*, 6 Cowen 635; *The Sadlers' Co. v. Badcock*, 2 Atk. 554; *Newby v. Reed*, 1 W. Bl. 416; *Park on Insurance*, 280 et sequ.; *Angel on Insurance*, ch. 9; Secs. 88, 89, 90, 91.

The following gentlemen were called to the bar during this term:—JAMES ROGERSON COTTER, WILLIAM WARREN DEAN, JAMES REYNOLDS, GEORGE MUNNS BARTON, HUSON WILLIAM MUNRO MURRAY, SALTER JEHOSEPHAT VAN KOUGHNET, FREDERICK WILLIAM KINGSTONE, JAMES HANVEY.

HILARY TERM, 23 VICTORIA, 1860,

Present:

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.
 “ ARCHIBALD McLEAN, J.
 “ ROBERT EASTON BURNS, J.

THE CANADA PERMANENT BUILDING AND SAVINGS
 SOCIETY v. ROWELL.

Building Society—Usury—Colourable membership—Ejectment against tenant of mortgagor.

The plaintiffs, a building society, sued defendant on a mortgage by which he covenanted to pay them £200 and interest, by monthly instalments of £4 10s., with all fines and forfeitures imposed upon defendant as a member of the society, with a condition that if he should make default for six months successively the whole should become due. Defendant set up as a defence, in various pleas, that the transaction was usurious; that defendant became a member of the society merely to evade the statute, and to enable him to borrow from them at an illegal rate of interest, and after executing the mortgage immediately disclaimed all share in the profits of the society.

It was proved that in order to borrow money a person must become a member and subscribe to the rules, but that the disclaimer was required only from those who borrowed, and their property was then not liable for losses of the company as in the case of other members.

Held, that the defence was not sustained, and that the plaintiffs were entitled to recover, for what the defendant did was authorised by the statute incorporating these societies.

In ejectment brought upon the same mortgage, it appeared that before the mortgage was given defendant became a tenant of the mortgagor for a year. *Held*, that at the end of that time his right ceased, and that the mortgagees could eject him without notice.

ACTION on a covenant in a mortgage, made by the defendant, on the 1st of July, 1857, binding him to pay to the plaintiffs £200 and interest, and charges thereon, in equal instalments of £4 10s. each, on the first day of each month during sixty months, until the whole should be paid, with all fines and forfeitures imposed by the said Society (the plaintiffs) upon the defendant as a member of the said Society, for or in respect of any default, or neglect, or breach of any of the rules, regulations, or by-laws of the Society, and with a condition that if the defendant should make default for

six months successively in the monthly payments, interest, fees, fines, or forfeitures, &c., at the times aforesaid, then the whole of the said payments, interest, fees, fines, and forfeitures, due or to become due to the Society from the defendant under the said covenant, should immediately after such default become due and payable. And the plaintiffs averred that though the defendant had made several payments to them under his covenant, yet more than six successive months had elapsed since the last of such payments had been made, and that during the said six months the defendant had not paid the moneys which he covenanted to pay, &c., but had made default, by reason of which the whole of the said payments, charges, interest, fees, &c., had become payable.

The defendant pleaded, 1st. A plea stating in substance that on the 1st of June, 1855, it was corruptly, and against the statute (against usury) agreed between the plaintiffs and one Lewis that the plaintiffs should lend to Lewis £344 16s., for five years, at a usurious rate of interest, namely, for £54 for one year, and £9 a month for the remainder of the five years, and besides certain other monthly payments, fines, fees, charges, &c., in respect of certain pretended shares: that in order to cover the said usurious transaction, and for no other purpose, the plaintiffs procured Lewis to subscribe the stock-book of the company, and that his taking shares was only colourable to evade the usury laws: that the £344 16s. was advanced upon that corrupt agreement, and upon a certain mortgage given by him for securing the said money: that Lewis immediately afterwards, at the request of the said plaintiffs, disclaimed all participation in the profits of the plaintiffs' Society; and that the defendant executed the indenture of mortgage sued on, at the request of the plaintiffs, for the further securing to the plaintiffs the money so lent to Lewis; and so the said last mentioned indenture is void.

Second plea.—That the plaintiffs are a Building Society, incorporated under statute 9 Vic., ch. 90, and are not authorised to take securities except from members of the Society: that the plaintiffs lent to Lewis, a member of the

Society, £400, upon a mortgage given by him upon certain lands: that at the request of the plaintiffs Lewis procured the defendant to become security to them for the money so borrowed, and that to evade the statute it was illegally agreed between the plaintiffs and the defendant that the defendant should subscribe the stock-book of the plaintiffs: that in pursuance of such illegal agreement the defendant did subscribe stock, and that the subscription is colourable only, and for the purpose of giving such security to the plaintiffs, contrary to the statute; and that it was agreed between the plaintiffs and the defendant that the defendant should not become a shareholder for any other purpose whatever; and that the defendant, after such subscription, executed the mortgage sued on, and immediately afterwards the defendant, at the request of the plaintiffs, disclaimed all share in the profits of the said Society; and so the said mortgage is void.

Third plea.—That the £200 mentioned in the declaration was lent by the plaintiffs to the defendant on a corrupt and usurious agreement, that the defendant should pay for forbearance £4 10s. a month for five years, together with certain other payments, fines, &c., and other charges in respect of certain pretended shares: that the defendant colourably and fraudulently, at the plaintiffs' request, took shares in the Society, falsely pretending to become a shareholder, but for no other purpose than to evade the statutes against usury: that he obtained the said loan from the plaintiffs, and gave the mortgage sued on to secure the same, and immediately afterwards, at the request of the plaintiffs, in pursuance of the corrupt agreement, disclaimed all participation in the profits of the said Society; and so the defendant says that the said mortgage is void, &c.

The plaintiffs took issue on these pleas.

At the trial, at Toronto, before *Draper*, C. J., it was proved that in April, 1855, one Lewis, wishing to borrow money, applied to the secretary of the Society, and was told that in order to borrow he must become a member of the Society. He then took two shares, and in June following took two more shares. He paid six months' instalments in

advance, £55 14s., in order to get six months' credit afterwards on subsequent instalments. Having taken the four shares, he subscribed to the rules of the Society. When he took the shares nothing was said about disclaiming, but immediately afterwards, in June, he did disclaim all participation in the profits allowed by the rules of the Society. When he obtained the advance, the defendant Rowell gave his bond to the plaintiffs as collateral security for the money, which was afterwards found or considered to be illegal, and Lewis having made default in his monthly payments, this defendant offered to take shares in the Society, and so raise money in order to pay off Lewis's debt. He did accordingly take shares, subscribed the stock money book, got £200 on the 10th of August, 1857, and applied it in paying £192 6s. 8d. on Lewis's account, and the rest on his own shares. It was well understood that the defendant borrowed the £200 in order to pay what Lewis owed, and having got it he signed a disclaimer.

The secretary swore that the whole object of Lewis and of the defendant was to borrow money: that there were two classes, borrowers and investors: that no one could borrow without becoming a member, and subscribing the rules, as both these parties did: that when any one became a member he might borrow money, and on receiving the loan might repay by monthly instalments, or might pay in advance, getting an allowance in consequence: that this defendant received the full sum of £200, and disposed of it as he thought fit: that having been security for Lewis, he made this payment in discharge of his obligation: that the disclaimer of profits was required only from borrowers, not from investors: that the property of the borrowers is not liable for losses of the Company, as that of investors is. The borrower gets the amount of his shares in advance, and repays them, getting no profits. The investor pays in his shares by monthly instalments, and gets profits.

This evidence being given, and the rules of the Society being produced, *Anderson*, on the part of the defendant, contended that he was entitled to a verdict on the issues.

The learned Chief Justice thought he was not, either on the plea of usury or those setting up a colourable membership, and he directed a verdict for the plaintiffs, but reserved leave to the defendant to move to have a verdict entered for him on the evidence, from which the court should be at liberty to draw whatever conclusions a jury might draw.

The jury accordingly found for the plaintiffs, and \$863.32 damages.

An action of ejectment was also pending in this court, upon the same mortgage given by the defendant Rowell. It was brought against Rowell and another defendant, Boxall, who was in possession of part of the land as tenant to Rowell. A verdict was given for the plaintiffs in that action, and a new trial was moved upon the same points taken by the defendants in the action on the covenant, and also on an affidavit of the defendant Boxall, that on the 12th of March, 1857, he leased from Rowell a part of the premises mortgaged, as tenant from year to year, by verbal agreement, and that he was still in possession under that lease.

Anderson obtained a rule *nisi* to enter a verdict for defendant, pursuant to leave reserved, to which *E. C. Jones* shewed cause.

Silver v. Barnes, 6 Bing. N. C. 180; *Mosley v. Baker*, 6 Hare 87; *Burbidge v. Cotton*, 5 DeG. & Sm. 17; *Consol. Stats. U. C.*, ch. 53; 16 Vic., ch. 80, were referred to.

ROBINSON, C. J., delivered the judgment of the court.

In our opinion the rule that has been obtained in the action upon the covenant, to enter a verdict for the defendant, must be discharged. There is no doubt, as has been urged on the part of the plaintiffs, that the mortgage being given after the statute 16 Vic., ch. 80, which to a great extent abolished the usury laws, the plaintiffs must be allowed to recover their debt, and six per cent. interest at all events, and the security cannot be held void; but we further think that we cannot interfere to any extent to prevent the plaintiffs obtaining the benefit of the security according to its terms.

What the defendant did in this case, in becoming a member and afterwards disclaiming to participate in the profits, is what may be done in any case under the statute which authorises such societies. It may be quite true that the taking shares with a view to borrowing, and not with the intention of continuing upon the footing of an investor, is only a contrivance to evade the usury laws, but we cannot but see very plainly that such societies are in themselves contrivances to evade by statute the usury laws, and therefore we cannot see much force in the objection, especially since the alteration in the laws regulating interest, which have in effect abolished usury altogether.

It is not denied that the defendant Rowell, after subscribing, could, if he desired it, become a borrower, for that is plainly allowed, and a borrower upon precisely such terms as the defendant in this case submitted to; and that being so, we have no authority to hold that he must continue a member for any certain time, without becoming a borrower. If he could borrow and disclaim profits at the end of a month, he might equally at the end of a week or on the next day; and indeed, since the passing the act of 16 Vic., ch. 80, usury has ceased to be an offence, and there can be no question, in regard to securities made since the passing of the act, that they cannot be held void on any such pretence as their having been made to cover any rate of interest, however high. The only objection can be as to the amount of interest that may be enforced under them. We think in this case there is no question of that kind, for we have nothing to do with what may be supposed to have been passing in the defendant's mind, when he subscribed for stock, as he could do, and afterwards, as he might whenever he chose, became a borrower.

As to the ejectment, the only point peculiar to that case is that which the affidavit of the defendant Boxall seems intended to bring before us, namely, that he became a tenant of the defendant Rowell, before the mortgage was given, for a year. At the end of that time we think his right to hold longer on such a tenancy ceased, because in the meantime the premises were mortgaged to the plaintiffs, and it requires

no notice from the mortgagor to put an end to the tenancy. If it had been shewn that the mortgagee had in any way made Boxall his tenant from year to year, the case would have been different. Both rules must be discharged.

Rules discharged.

ALEXANDER R. MACDONELL V. DONALD A. MACDONALD.

Will—Construction—Devise of land in Upper Canada dependent on performance of condition as to land in Lower Canada—Conflict of laws.

Testator, by his will made in 1842, devised the land in question, lot 37, to his son J., and to the plaintiff, Alexander, another son, lot 32, but directed that if J. should prefer lot 32 he should take it, and the plaintiff should then have lot 37. By a codicil he declared his will to be, that if his son Allan should not take holy orders, as he intended, then he should have lot 37 and J. lot 32, and the plaintiff the west half of lot 31; and he added, "the one brother may change or sell to the other with consent of the major part of the executors, but not out of the family; but should Allan not divide or give over in full an equal portion of the house in St. Paul's street, Montreal, as was his mother's intention, as appears by her last will, in which case I order and devise, that my said son Allan shall only receive of my property what has been willed to him in my last will, then this codicil to be null and void." The will of Mrs. Macdonell referred to, was made in Upper Canada in 1828, and devised the house mentioned to her son Allan, "with power to give an equal share to his sisters Helen, Catherine, and Harriet, and to his brother John."

After the testator's death J. elected to take lot 32. Allan never took holy orders, but he had not divided the property in St. Paul street, but on the contrary had treated it as his own, and having mortgaged it his interest was sold under a judgment to the mortgagees, who subsequently procured a release from the brother and sisters named in Mrs. Macdonell's will, of their interest, and obtained a judgment of distribution in Lower Canada.

It was proved by two advocates from Montreal, that by the law of Lower Canada the will of Mrs. Macdonell vested an equal interest in the land in Allan and his brother and sisters named.

Held, that the condition in the codicil respecting the property in Montreal must be governed by the law of Upper Canada as regarded its effect upon the land in question; but

Held, also, that whether the land did or did not vest in the brothers and sisters by the terms of the codicil was immaterial, for Allan's conduct was nevertheless a violation of the condition within the meaning of the testator, and he therefore did not take lot 37, but the original devise to the plaintiff took effect.

Burns, J., dissenting, and holding:—1. That if the will of Mrs. Macdonell could be held to vest an equal estate in the children in the property in Lower Canada, the failure of Allan to make a division would not defeat the devise to Allan of this land, for it was made by the law, but that her will must be governed by the law of Upper Canada, which would not give it that effect. 2. That the condition in the codicil must be rejected as insensible and inconsistent with the will, and that the defendant, who claimed under Allan, was entitled to succeed.

EJECTMENT for lot No. 37, in the second concession of Lochiel.

The plaintiff claimed under the last will and testament of Angus Macdonell, deceased.

The defence was for part of the premises, being all that portion not excepted in the will for the widow's use, and defendant claimed title under a deed of bargain and sale from John Watson Macdonell, and also by deed of the sheriff of the united counties of Stormont, Dundas and Glengarry.

The case was tried before *McLean*, J., at Cornwall, when the following facts were admitted:

1. That Angus Macdonell, the testator, died seised, in 1843.

2. Execution of will and codicil, of which a copy was put in by consent.

3. That his first wife died about 1828.

4. Execution of her will relating to lands in Lower Canada—a copy put in.

5. That John Watson Macdonell, named in the fourth clause of the will, and to whom the land in question was in that clause devised, elected to take No. 32, on which the mills were, as allowed in clause 16 of the same will.

Extracts from each will were put in.

Allan Macdonell was called, and proved that he did not divide the property in Lower Canada, but, on the contrary, used it as his own immediately after his father's death in 1843, took the rents and profits to himself, and becoming embarrassed mortgaged the whole property to Torrance & Co.: that it was sold also on an execution in favour of Torrance & Co.: that he always treated all the property in Lower Canada as his own, and considered that he was the sole owner, and that Torrance was convinced of this when he took the mortgage from him. He attained his majority in 1839.

The plaintiff also put in a notarial copy of mortgage of the Lower Canada property from Allan to Torrance & Co. This closed the plaintiff's case.

The defendant put in a memorial of mortgage of the land from Allan to John Watson Macdonell, dated in 1846, and a deed from John Watson Macdonell to defendant.

Also two judgments against Allan (one in favour of Tor-

rance & Co.) upon which the land was sold, the defendant becoming the purchaser of Allan's equity of redemption, the fee having before passed to John Watson under the mortgage from Allan to him.

A deed from the sheriff to defendant was also put in.

The defendant called Mr. Cross, an advocate from Montreal, who stated that he had seen the will of Mary Macdonell, and was of opinion that it was an absolute bequest to Allan and his brother and three sisters named in it: that they would under it take an equal share with Allan: but that of course, as Allan went into possession and took the rents and profits from the time he came of age, it would be necessary for the other children to bring an action at law for their rights under their will.

Mr. Dunkin, advocate, agreed with Mr. Cross.

Defendant also put in a judgment and sale of Allan's interest in Lower Canada in favour of Torrance, under which Torrance went into possession as Allan had been.

Defendant put in a notarial copy of letters of attorney from John Watson Macdonell and his sisters, under which they released their rights to Torrance for £35 each, executed in 1854, six or eight years after Torrance bought Allan's interest and took the mortgage from him.

It was admitted that Allan did not take holy orders.

Defendant also put in a judgment of distribution of the Lower Canada property, in which the names of the brothers and sisters of Allan were given, but it could not be shewn that it was at their instance the distribution was made; on the contrary, Cross proved that it was done at the instance of Torrance, who used the release or assignment from them for that purpose.

The defendant contended, that if by the law of Lower Canada Mary Macdonell's will divided the property, it was not necessary for Allan to have done so: that the division by Allan was not a condition but a conditional limitation; and that the action at all events could not be brought till after Allan's death.

The learned judge said his impression was with the plaintiff, and a verdict was so found, subject to the opinion of the court.

The following are the extracts from the wills referred to.

Angus Macdonell, of Alexandria, by will, dated the 29th of March, 1842, in clause 3, devised to his wife Isabella Macdonell, during her widowhood, the west end and upper and lower parts of his house, and one third of the farm.

Clause 4, devised lot No. 37, in the second concession of Lochiel, to his son John Watson Macdonell, his heirs and assigns for ever, except that his step-mother was to have the use of one-third of it as above stated.

Clause 5, devised to his son Alexander Roderick, and his heirs, lot No. 32, in the second concession.

Clause 14 gave and devised to his son Allan, his watch, seal, &c.

Clause 16, that should John Watson Macdonell prefer to take possession of lot No. 32, on which the mills were situate, (the lot in clause five devised to Alexander Roderick,) he might take it to himself and his heirs for ever; in which case he ordered and devised lot No. 37 to become vested in Alexander Roderick, the same as if it had been willed to him, with the incumbrance that would have followed it should John have kept it.—[In clause 20 he ordered and devised lots 31, 32, and and 37, never to be sold or exchanged, but to continue to his heirs, from father to son, or their lawful heirs for ever, excepting such as might be leased or sold in village lots at not less than a price specified.]

Clause 24 ordered and devised: that John Watson should support his sisters until provided for out of the proceeds from village lots, if he kept lot No. 37, or Alexander Roderick to do the same if John took the other lot with the mills.

By codicil dated the first of April, 1842, he declared his will:—1. That his son Allan (named in clause 14 of the will) should take holy orders, &c., as was his intention when he went to Rome.

2. Should his said son Allan's health, or any other reasonable cause or circumstance, cause him not to take holy orders, he ordered and devised that Allan should have to himself and his heirs for ever the whole of lot No. 37, in the second concession of Lochiel, with the reservations made in the will, in which case John W. was to have lot No. 32, and Alexander Roderick the west half of lot No. 31; and he added, "the one brother may change or sell to the other with consent of the major part of the executors, but not out of the family.

3. "But should my son Allan not divide or give over in full an equal portion of the house in St. Paul street, Montreal, as was his mother's intention, as appears by her last will, in

which case I order and devise, that my said son Allan shall only receive of my property what has been willed to him in my last will, before this codicil was written, then this codicil to be null and void, otherwise to remain in full force and virtue."

Extract from will of Mary Macdonell, made at Alexandria in Upper Canada, on the 17th of December, 1828.

Clause 2.—"I give, devise, and bequeath my house and property in St. Paul street, Montreal, left me by my former husband, Michael Trudeau, to my son Allan, with power to give an equal share to his sisters Helen, Catherine, and Harriet, and to his brother John."

Clause 4.—"All disputes arising in the distribution of the above property are to be settled by the executors," whom she named in her will.

Alexander Chisholm and Angus Macdonell, as surviving executors of Mary Macdonell, signed and sealed a declaration, which was registered on the 30th of October, 1844, in the registry office for the county of Montreal, wherein they declared that they were decidedly of opinion that the said testatrix intended by the said will to confer an equal interest in her said house and property in St. Paul street, Montreal, on her said children, Allan, Helen, John, Catharine, and Harriet, and they ordered thereby that the rents and profits arising from the said house or property should be equally divided between them.

Cameron, Q. C., for the plaintiff.

Adam Wilson, Q. C., and *Richards*, Q. C., contra, cited *Graham v. Lee*, 23 Beav. 388; *Doe dem. Davies v. Davies*, 16 Q. B. 951.

ROBINSON, C. J.—The plaintiff, Alexander R. Macdonell, is the son of the testator Angus Macdonell, and claims the lot in question, 37 in the 2nd concession of Lochiel, under his father's will, made on the 29th of March, 1842, in Upper Canada. By that will the testator, Angus Macdonell, after devising to his wife (a second wife) Isabella, a certain portion of that lot during her widowhood, devised this lot 37 to his son John Watson Macdonell, in fee, subject to his stepmother's interest in it, given in the same will, and he devised to this plaintiff, Alexander Roderick, another son of his, lot 32, in the 2nd concession of Lochiel; but if

his son John Watson Macdonell should prefer to have the above lot 32, on which there were mills, rather than the lot 37, then he willed that he should take that lot 32 in fee, and that the testator's son Alexander Roderick, the plaintiff, should in that case have the lot 37 in fee, to hold subject to the stepmother's interest, as John Watson would have held it.

Then a few days afterwards,—namely, on the 15th of April, 1842,—Angus Macdonell, the testator, executed a codicil, in which he declares his will to be, that if his eldest son, Allan, from ill health, or other reasonable cause, should not take holy orders, as he had intended to do, then he should have the lot 37, (subject to the stepmother's interest,) and John Watson Macdonell should in that case have 32, and Alexander Roderick, (the present plaintiff,) should have the west half of 31. But in this codicil Angus Macdonell, the testator, declared his will further to be that, “*should Allan not divide or give over in full an equal portion of the house in St. Paul's street, Montreal, as was his mother's intention, as appears by her last will, then I order and devise that Allan shall only receive the property given to him by the will,*” (which was some articles of personal property, of small value,) “*and this codicil shall be null and void.*”

The will of Allan's mother, Mary Macdonell, alluded to in this codicil, who was the testator's first wife, was made at Alexandria, in Upper Canada, on the 17th of December, 1828, and it devised “the house and property of the testatrix, in St. Paul's Street, Montreal, left to her by her former husband, Michael Trudeau, to her son Allan, *with power to give an equal share to his sisters, Helen, Catherine, and Harriet, and to his brother John.*” And she directed that all disputes arising in the distribution of the said property, should be settled by the three executors named in her will. Two of these executors, the third having died, signed and sealed a declaration, which was registered on the 30th of October, 1844, in the registry office in the county of Montreal, whereby they declared, “that they were decidedly of opinion that the testatrix intended by her said will to confer

an equal interest in her said house and property in St. Paul's Street, Montreal, on her said children Allan, Helen, John, Catherine and Harriet, and they ordered thereby that "the rents and profits arising from the said house and property should be equally divided between them."

The testatrix died in or about 1828.

The testator, Angus Macdonell, died in 1843. After his death, John Watson Macdonell elected to have lot 32. Allan Macdonell never took holy orders, and would therefore have been entitled, under his father's will, to lot 37, if he had not, as the plaintiff contends he did, lost the benefit of the devise of the lot 37 made to him in the codicil, by *not dividing or giving over in full an equal portion of the house in St. Paul's street, Montreal*, according to his mother's intention expressed in her last will.

To prove that Allan Macdonell did not observe the direction of his father in this respect, as expressed in the codicil, the plaintiff called Allan Macdonell himself, who swore that he did not divide the house and property in Lower Canada with his brother and sisters named in his mother's will, but, on the contrary, used and enjoyed it as his own, exclusively, immediately after his father's death, he, Allan, having become of age in 1839: that he took the rents and profits to himself, and becoming embarrassed mortgaged the whole property to Messrs. Torrance & Co., as was proved by production of a copy of the mortgage.

On the part of the defence a deed was put in, by which Allan Macdonell, in 1846, mortgaged the lot 37, now in question, to John Watson Macdonell, who conveyed his interest to the defendant in this action.

It was also proved that two judgments had been entered up in this province against Allan Macdonell, one in favour of Messrs. Torrance & Co., under which Allan's equity of redemption was sold, (not stated when,) to this defendant, the fee being in John Watson, under his mortgage.

Two advocates from Lower Canada were examined upon the trial, and stated that by the law of Lower Canada, according to their opinion, the will of Mary Macdonell constituted an absolute bequest to Allan and his brother John,

and the three sisters named in her will, of the property in St. Paul's street, and that they took by the will an equal share with Allan, though of course, as Allan went into possession, and took the rents and profits from the time he came of age, it would be necessary for the other children to bring an action for their rights under the will.

It was proved that under a judgment rendered in Lower Canada, in favour of Messrs. Torrance & Co., the interest of Allan Macdonell in the property in St. Paul's street was sold, and was purchased by Torrance, who entered into possession, And it was also shewn that in 1854, six or eight years after Torrance had bought Allan's interest, and after he had taken the mortgage from him, John Watson Macdonell and his sisters, for £35 paid to each, released their interest to Torrance; and that afterwards a judgment of distribution was obtained in Lower Canada, of the property there, in which the brothers and sisters of Allan were named, but this was not at their instance, but at the instance of Torrance, who for his own purpose availed himself of the release or assignment which he had obtained from them.

The defendant contended that as the will of Mary Macdonell vested in her children named in it a joint interest in her property with her son Allan, nothing was necessary to be done by Allan for perfecting that disposition, and that the estate of Allan in the lot 37 given by the will could not therefore have been forfeited or defeated by any thing contained in the codicil to Angus Macdonell's will, dated the 15th of April.

We could not safely dispose of this case without seeing copies of the two wills, for fear there might be something material to be considered, that had not been included in the extracts given in the case. These copies were only furnished to us a short time ago, and we now see that the passages extracted are all that can have any bearing upon the question of title to the lot 37 in the 2nd concession of Lochiel, on which alone we have to determine.

The plaintiff claims that land under the will of his father, Angus Macdonell, and whether he has under that will a legal title to it must depend of course upon the law of this

country, in which the land is situated. The question turns upon the effect of the condition in the codicil to the will of Angus Macdonell, under which it is contended, on the part of the plaintiff, that Allan Macdonell, the eldest son of the testator, has lost the benefit of the devise to him of this lot 37, contained in the same codicil. That Allan Macdonell had for some sufficient reason changed his intention, and had not taken orders as a priest, is admitted; and it must have followed as a consequence that this lot 37 became his property, unless it failed to vest in him, or unless he has lost it by not complying with the condition in his father's will, which required him to "*divide or give over in full an equal portion of the house in St. Paul's street, Montreal, as was his mother's intention, as appears by her last will.*" If he failed to observe what his father required of him in that respect, then he was only to have the few articles of personal property that his father had bequeathed to him in his will of the 29th of March, 1842.

As regards the property in Montreal, it need hardly be said that no decision of this court can affect the title to that lot which any person or persons took under the will of Mrs. Mary Macdonell, executed in 1828. The effect of that will upon the estate itself must be settled by the law in Lower Canada, in which the house is situated. The only object of this suit is to determine who is now entitled to the lot 37 in the township of Lochiel, in *Upper Canada*.

If it be necessary to the decision of that question to ascertain to whom the interest in the house and property in St. Paul's street passed under the will of Mrs. Mary Macdonell, we must no doubt look to the law of Lower Canada, as governing that point. But in order to dispose of any question that arises respecting the effect upon the lot 37 in Lochiel, of the condition in Angus Macdonell's will in which the property in Montreal is mentioned, we must take the law of Upper Canada as our guide; and so, also, upon the question as to the effect of what Allan Macdonell has done, or attempted, or has omitted to do, with respect to that property, as being a fulfilment or breach of the condition on which his title to the lot 37 was to depend, we must be governed by the

law of Upper Canada. In Story's "Conflict of Laws," sec. 279 *a*, it is said, "Hertius has put a case, where a contract made in a country is subject to a condition, and the performance of that condition takes place in another country, the laws of which are different; and the question is, whether the laws of the one or those of the other ought to govern the contract. He answers that the laws of the country where the contract was made, because the condition when fulfilled refers back to the time of the contract," and he cites another writer upon the civil law, who adopts the same doctrine. The principle is not less applicable, I think, in the case of a will made in Upper Canada respecting lands situated there, and containing a condition to be performed in Lower Canada.

Mrs. Mary Macdonell devised her house and property in Montreal to her son Allan, *with power to give* an equal share to his three sisters and his brother named in the will. The meaning of this is rather obscure, for when she gave the property to Allan she gave him of course the *power* to do what he chose with it, and he could give an equal share to his brother and sisters without being authorised to do so by the will. We may reasonably, therefore, look upon the words "*with power to give*," as intended to be a direction to the devisee Allan, rather than an authority; as if the testatrix had said "*in order that*" he may give an equal share, &c., or "*in trust to give* an equal share," &c. Then what is meant by his giving *an equal share* to his sisters and brother? Does the will mean only that Allan was to be the instrument of dividing the estate equally among the other four, or does it mean what is not expressed, that he was to allow the four others to share the property equally with himself, or that he was to take half himself, and give an equal share, or the other half, among the others in equal proportions?

I have little doubt that the intention was that he was to allow the brother and sisters to share equally with himself, though it is not clearly expressed; and it is satisfactory to find that the executors, who according to the will were to decide all disputes about the division of the property, took

the same view of the will. I am not quite sure, however, that the testator did not mean that Allan should either "divide" the land with them, or give over the land in full to them, as he might be willing to do, either one or the other.

Though Allan Macdonell became of age two or three years before his father died, he does not seem to have done any thing in regard to this property in Montreal during his father's lifetime; his father had probably been receiving the rents in the meantime; but according to his own account, immediately after his father's death (in 1842) he did turn his attention to that estate, but not with any view of either giving to his brother and sisters their share of the property, or of the rents or profits, or of allowing them to participate with him to any extent, but he took the whole to himself, and mortgaged it as if it were his own property, and so dealt with it that it has in fact passed into the hands of others to pay his debts.

It is argued on the part of the defendant, that this could work no forfeiture of Allan's estate in lot 37, if, as was stated by the professional gentlemen from Lower Canada, who gave evidence upon the trial, the property in the house in Montreal did, by the law of Lower Canada, vest in the five children of Mrs. Mary Macdonell at once upon her death, without any thing being done by Allan Macdonell to perfect the title of the others. But admitting that the estate did so vest, the condition in the codicil to the will of Angus Macdonell was in my opinion nevertheless broken, for that is to have effect according to what we must see to have been the real intention of the testator in disposing of the lot 37, in Lochiel. He, perhaps, had reason to be doubtful of what his son Allan might do or attempt to do in regard to the house in Montreal, and he may have known or imagined that Allan would claim to be sole seised of the legal estate, under the words which, literally taken, devised it *to him* alone, though with an intention or wish expressed that the other children should share with him. The testator had at any rate a right to contemplate the possibility of Allan taking or endeavouring to take the Montreal property to

himself, and in disposing of his property in Upper Canada, among his children he had a right to act upon what he took to be the intention and effect of Mrs. Macdonell's will, and to guard against such trouble by making the devise of lot 37 to Allan dependent upon the course he should pursue in regard to the other property. Accordingly he made it a condition, that "if Allan should not *divide or give over in full an equal portion of the house in St. Paul's street, as* was his mother's intention, as appears by her will," then he should receive only the personal property given to him by the testator's will.

I do not think it material to consider whether this was a condition precedent to the estate in lot 37 vesting in Allan under the codicil, or a condition subsequent, by non-observance of which the estate might be defeated. In either case the devise over to the present plaintiff Alexander, another son of the testator, would equally take effect if Allan acted in violation of the condition. And that he did so act is perfectly clear, for he not only did not "divide or give over in full to the others their shares, according to his mother's will, but he did not leave them to receive and enjoy what the law might have given them under the will alone, without any thing being done on his part, but he took all to himself in fact, and disposed of the house as if it had been exclusively his. Admitting the fact to be, that under his mother's will, and by force of it alone, the house belonged as much to the other four children as to himself, that would not make his conduct the less a breach of the condition; on the contrary, the plainer and more perfect their right was to share with him, the more inexcusable was his conduct in disregarding the plain intention of his father's will, that so far as he was concerned his brothers and sisters should have the benefit of what their mother intended for them. It is no answer to the plaintiff's case, in my opinion, that the children had a legal interest in the property independently of any act of Allan's, which interest they might have asserted if they were at the time capable of vindicating their rights. He broke the condition on which his right to the lot No. 37 depended, if instead of giving or leaving to them the actual

enjoyment of their interest, he did what he could to keep it from them, and it cannot be said that he could not keep them from their right when we see that in fact he did it.

The condition being broken, the devise over to the plaintiff took effect, and it could not in my opinion be of any consequence to this title, if the children some years afterwards did, for a trifling consideration, release their interest in favour of Mr. Torrance, who through his transactions with Allan had got into possession of the whole. That would not vest the estate again in Allan, which he had lost by breach of the condition in mortgaging the estate both to John Watson Macdonell and to Mr. Torrance, as if he were sole seised, and by receiving and keeping to himself all the rents and profits before he made those mortgages.

The plaintiff has expressly in his notice claimed the lot 37 under the will of his father, and he cannot be permitted at the same time to claim under the will and against it. He must shew that he has submitted to the condition on which this land which he now claims was given to him, or it must be held as a consequence that the devise over to his brother, the present plaintiff, took effect, and in such a case a court of equity can no more than a court of law relieve him from the effect of his having disregarded the condition on which alone he could hold the estate. I refer to *Cleaver v. Spurling*, (2 P. Wms. 528,) to *Boughton v. Boughton*, (2 Ves. 12,) *Streatfield v. Streatfield*, (Ca. Temp. Talb. 183,) *Webb v. Webb*, (1 P. Wms. 136, note,) *Macnamara v. Jones*, (1 Br. Ch. Ca. 482,) *Doe v. Hawke*, (2 East 481,) which is in substance like the present case, a conditional limitation with a devise over on a breach of the condition.

I have assumed that the devise by Mrs. Macdonell carried the whole interest, and not an estate for life only, though if a devise had been made at that time of land in Upper Canada in the same form of words, the interest devised must probably have been held to have been a devise of an estate for life only. That would have turned upon legal principles peculiar to the law of England, and which I take it do not prevail in Lower Canada, where the civil law is the groundwork of the system.

In my opinion, the *postea* should go to the plaintiff.

BURNS, J.—The plaintiff bases his right to recover upon the proposition that an election was given by the will of Alexander Macdonell to his son Allan to make a division of the property which he took under his mother's will, and that if he did not make such division then Allan's right to the land in question became forfeited, and the original devise of it to the plaintiff would come into operation. The plaintiff must further make out, however, that there was some time within which to make such election, if he must elect, because, if Allan had the whole of his life-time to do it in, then the plaintiff's claim would be premature, and he must fail upon that ground. Accordingly the plaintiff has given evidence to shew that Allan treated and dealt with the property in Montreal, devised by his mother's will, as his own, and that he has disposed of it in such a way that he can no longer exercise an election or perform his mother's will.

The testator, by the codicil to his will, has so incorporated his wife's will into his own that we must turn to that will, and see how the estate therein devised was disposed of. This case has been argued upon the assumption that the wife had a right to make a will of her real estate. The will appears to have been made and executed in Upper Canada, and to operate upon property in Lower Canada. Evidence was given at the trial to shew that by the law of Lower Canada the effect of the devise was to give a present interest to the children of the testatrix, along with Allan, in the house and property in Montreal, and consequently there was no election to be exercised by Allan with regard to that property.

The argument for the defendant, upon that point being established, is, that the testator has assumed that Allan had a power to divide the property in Lower Canada, whereas in truth he had no such power, and therefore the condition annexed by the testator to the devise to Allan in fee of the land in question was void.

This, I take it, is the position of the case as it was presented to the court by the parties. Assuming the law of Lower Canada to be as stated, namely, that the power given

to Allan to give an equal share to his sisters and brother of the property in Montreal vested in them a present interest of enjoyment—then I should say the defendant is right. The testator by the codicil says that the codicil shall be null and void in case Allan should not divide or give over in full an equal portion of the house in Montreal, as was his mother's intention, *as appears by her will*. Now if her will did of itself give that property in equal portions, as it is contended was the law of Lower Canada, then it is obvious enough the condition, so to call it, was performed before it ever was annexed to the taking of the estate, and the devisee, Allan, should take the estate free from any further consideration.

I am not disposed to say that a testator may not annex a condition that his devisee shall perform that which is the law with regard to something he desires should be carried out strictly, but then I take it such would be the case with a condition precedent, and not one which is a condition subsequent. The condition, or rather, perhaps, more technically speaking, the conditional limitation, in this case is subsequent, and the non-performance of the mother's will by the devisee was to defeat the estate which had before been given to him by the testator. One can easily see a distinction between an obligation cast upon the devisee of fulfilling and performing the law with respect to some other matter as a condition precedent to his taking an estate, and the performance of the law after he has got the estate, to enable him to keep it, or rather to prevent a forfeiture of it. Where no time is mentioned, as in this case, I suppose in the case of a condition precedent a reasonable time, or demand made, or something of that kind, might determine whether the devisee was to have the estate, or whether it should go over to the person who otherwise would take it; but in case of the performance of the law as applied to that other matter, in order to prevent forfeiture, where no time is limited I do not see what is to prevent the time being extended to the whole of a person's life-time. The rule of construction is that the law does not favour conditions which are annexed, having for their object the destruction of estates.

I am not disposed, however, to think the will of Mrs. Macdonell should be construed as stated by witnesses at the trial to be the law of Lower Canada. I do not mean to be understood as saying that the will should not be construed as stated was the law of Lower Canada, for the property upon which it was to operate being there of course it should be so construed. All I mean is, that if to operate upon property in Upper Canada, I do not think it should be so construed. I look upon the devise *to my son Allan, with power to give an equal share to his sisters, Helen, Catharine and Harriet, and to his brother John*, as a devise for life to Allan, with power to give the inheritance to the persons named. If there were nothing said about a power to give the property to any other person, then upon the words used Allan would have taken a life estate. The power to give an equal share cannot mean an equal present share with himself. It does not say so. Then the equal share to be given must mean between the four persons named, and that precludes the idea of a joint interest vested in the four persons presently. If there had been an express estate for life given, with liberty to give the fee to particular persons, there could be no question upon the subject. The case of *Tomlinson v. Dighton* (1 P. Wms. 149) is an express authority upon the point. In Mr. Sugden's work on Powers, vol. I., p. 121, where the subject is treated, he says, "But where an estate for life is not expressly given, but the estate is bequeathed generally to the devisee, to such uses as he shall appoint at his will and pleasure, nevertheless restraining the disposition to particular objects, it seems doubtful whether the devisee will take a fee simple conditional, or an estate in fee upon trust, or an estate for life, with a power to dispose of the inheritance." The cases are reviewed in that work, and he sums up thus, "The better opinion, however, certainly is, that the devise is for life, with a *power* to appoint the inheritance, unless the words of the will clearly negative such a construction, and the authorities appear to be greatly in favour of that opinion."

Taking this view of Mrs. Macdonell's will, the question then is what effect that should have upon the testator's will,

which does operate upon lands in Upper Canada. I take the condition in the codicil clearly to mean that the testator thought at the time his son Allan had a power to divide the property in Montreal. The difficulty in this case is to arrive at any correct conclusion as to what he thought that power was, and when and in what way it was to be exercised. Mrs. Macdonell died in 1828, shortly after making her will. The codicil to the testator's will was made on the 1st of April, 1842. Mrs. Macdonell put a clause in her will, that all disputes arising in the distribution of the property mentioned should be settled by her executors. I do not think that makes any difference in the construction of her will, or that it has any application in the construction of the testator's will, so far as affects the question before us. The testator has referred to the division to be made by Allan, and, as he says, *as appears by her last will*. Now did the testator understand that a legal division had in fact been made by the will, as they say is the way the will would be construed in Lower Canada? If so, then it was absurd, if he knew that to be so, to annex any such condition to his devise to Allan having the effect of divesting the estate. Then did he mean the division to be in the way I think Mrs. Macdonell's will should be legally construed? If so, the power of appointment to the sisters and brother would take effect after Allan's life estate was exhausted, and in that case Allan must in the mean time take the land in question, and the forfeiture would only arise when he failed to fulfill the power given to him in the mother's will. The testator could not have meant that, for the whole will and codicil is inconsistent with that view. By the will he gave lot 37 to his son John, lot 32 to the plaintiff, and lot 31 to James, providing, however, that John might elect to take lot 32, in which case the plaintiff was to have lot 37. Lot 37 is the land in question. By the codicil the testator changes the whole disposition, and gives lot 37 to Allan, lot 32 to John, and lot 31 he divides equally between the plaintiff and James. I cannot bring my mind to think the testator intended the whole disposition made by the codicil to become void after the exhaustion of Allan's life estate in his

mother's property, and on his not making any division of it among the sisters and brothers. The testator says that if Allan does not divide or give over in full the Montreal property, then the codicil was to be null and void. The whole disposition to all the brothers would become disarranged, and if the estates which they all took (for the reading of the codicil is so) were to depend upon the performance of such a condition by Allan, the whole would or might be thrown into inextricable confusion.

We must, in my opinion, therefore look for some other solution than either of those pointed at, as to what the testator meant when he annexed a condition to Allan and the other brothers taking an estate in the different lots specified, that it should depend upon Allan performing his mother's will. If he meant that Allan was to divide the Montreal property presently upon taking the property devised under the testator's will, it would be a condition precedent, but he has not said so, for he refers to the mother's will as being the guide for Allan. The proposition the plaintiff contends for is the only alternative, namely, that there was an election to be exercised by Allan, and he contends that he did exercise it. I, however, fail to see, taking these two wills together, that the doctrine of election has any thing whatever to do with the case. Under the mother's will there clearly is no election. Allan, under that, either took an estate for life, or an estate in fee upon trust, or a fee simple conditional, or, as contended was the law of Lower Canada, the whole of those named took a joint present interest, and in either of these cases the devise was a fixed settled one, not creating any election to be exercised. Certainly no case of election is provided for in the testator's will, for he makes his disposition to depend upon something which was probably intended for a condition, but what that condition was I must say I cannot discover.

If I was satisfied that the true construction of Mrs. Macdonell's will was that the five daughters and the two brothers took an estate as joint tenants or tenants in common, I think there would be an end of the plaintiff's case, for then I should look upon the condition annexed by the testa-

tor as already performed by operation of law, and therefore it would be idle to consider a matter stated by the testator having the same operation. But if we take the will of the mother to mean that Allan either had a life estate, with power to give the property afterwards to the particular persons named, or that he took any other estate, either in trust or conditional, then it appears to me the condition annexed by the testator was insensible and inconsistent with his will, and should therefore as such be rejected, in order that we may give effect to the will.

It is not Allan's estate in lot 37 alone which would be liable to be defeated, but the estate of all the other brothers are involved. The lot 37 was devised to Allan upon another condition which is not in question, and he it seems took the devise. The other lots devised to the other brothers were dependent upon Allan taking lot 37. That is quite plain. And then the testator says that if Allan should not divide, *as was his mother's intention*, the codicil shall be made null and void, and the whole is made dependent upon Allan doing so.

The mother's intention must be gathered from her will, of course, and then, when we read that, we see that the clause which the testator has inserted in his will is an insensible condition, and impossible to be carried out. The last provision in the codicil, just before the condition, I think proves that to be so beyond question. That provision is, that *the one brother may change or sell to the other, with consent of the major part of the executors, but not out of the family*. I do not mean to say that this provision would operate restrictively, or that it could control any of the devises already made, but it serves, I think, to shew that the testator never meant that he had annexed a condition by what follows it, the performance of which was impossible. If the brothers might sell what was devised to them, it would be altogether inconsistent with the notion that they took an estate upon condition, and subject to Allan's performing his mother's will.

I should rather think, upon the whole, what the testator most probably meant was, that in case Allan took holy

orders, in which case he would not take lot 37 at all, then the whole codicil should be void, and in that case the will itself would stand; but that if he did not take holy orders, and so would take lot 37, he meant to enjoin upon him nevertheless that he should perform and carry out his mother's will; but the language is not so expressed as we can say he meant that. And if he did mean this, then that would seem to imply that the sisters and brother named in the mother's will would take an interest in the Montreal property at the time he would take under the testator's will. Mrs. Macdonell had died years before the testator made his will, and whatever interest passed to the parties had become vested. It seems to me under any view of the case impossible to define what the testator did mean by the condition, and for that reason I think it must be discarded.

For these reasons I think the *postea* should go to the defendant.

McLEAN, J.—This case came on to be tried before me at the last spring assizes at Cornwall, and I then hesitated to try it, on account of the relationship between me and the parties on both sides; but I consented to proceed with it, as the delay would be attended with great inconvenience and expense, witnesses being in attendance from New York and Montreal, and I reserved for the consideration of the court the questions of law arising in the case.

I did not intend to take any part in deciding these questions, but my brothers entertaining different views, and considering it desirable that litigation should be brought to a close as soon as possible, and having at the trial formed an opinion in favour of the plaintiff, which opinion I still entertain, I think it will be for the interest of all parties that I should join in the judgment, so that there may be an appeal if thought desirable. I, therefore, under these circumstances, concur in the judgment as given by his lordship the Chief Justice, in favour of the plaintiff.

Judgment for the plaintiff—BURNS, J., dissenting.

FRASER v. MATTICE AND BROEFFLE.

Sale for taxes—Ejectment by purchaser—Evidence of distress—Description of land in sheriff's deed.

In ejectment brought upon a sheriff's deeds for taxes, the plaintiff shewed that the lot was wholly in a wild state, with no one living on it, and that an inspection had been made to ascertain if there was any distress, but none was found. The defendant proved that certain persons were then in the habit of making sugar upon the rear of the lot, and used to leave there two kettles and their sap troughs, which might have been worth the sum due. The jury having found for defendant:

Held, that such evidence should not have been allowed to invalidate the sale, and a new trial was granted without costs.

Defendants claimed under two deeds from the sheriff, made upon different sales. One described the land as thirty acres of the lot, "to be measured according to the statute in that case made and provided," the other as "twenty-five acres" of the lot, giving no further description.

Held, that the first deed was sufficient, the second not.

EJECTMENT for lot 15, in the 7th concession of Osnabruck.

The defendant Mattice claimed the west half of the lot, and the defendant Broeffle claimed other 55 acres of the lot, under a sale by the sheriff for taxes.

The question at the trial was whether there was or was not proof of there having been sufficient distress upon the premises while the warrant to levy was in the sheriff's hands, out of which the sum to be levied for taxes might have been made.

The learned judge thought the evidence did not shew that there was such distress, and that the title of the defendant under the sale for taxes could not on that ground be held to be invalid, but the jury found otherwise, and a verdict was rendered for the plaintiff against both defendants.

There was also an objection taken by the plaintiff to the validity of the sheriff's deeds given upon the sales for taxes. It was contended that they were so vague and uncertain as to the land sold, that it could not be held that any land passed by them.

The sheriff's deed to Broeffle, made on the 4th of March, 1841, conveyed to him "thirty acres of lot number 15, in the 7th concession of the township of Osnabruck, *to be measured according to the statute in that case made and provided.*"

The sheriff's deed to Alexander McDougall, who conveyed afterwards to the defendant Broeffle, was made on the 15th of

August, 1851, on a sale for taxes made in 1846 or 1847. It described the land thus, "All that plot, piece or parcel of land, or ground, situate, &c., in the township of Osnabruck, in the county of Stormont, and composed of twenty-five acres of lot number 15, in the 7th concession of the said township of Osnabruck."

Richards, Q. C., moved for a new trial on the law and evidence, citing *Doe Haverson v. Franks* 2 C. & K. 678; *Doe Smelt v. Fuchau*, 15 East 286.

C. Robinson shewed cause, and cited *Doe Powell v. Rorison*, 2 U. C. R. 201; *Doe Powell v. Craig*, ib. 208; *Snyder v. Proudfoot*, 15 U. C. R. 540; *McCollum v. Wilson*, 17 U. C. R. 577; *Foley v. Moodie*, 16 U. C. R. 254; *Cummings v. McLachlan*, 16 U. C. R. 628; 6 Geo. IV., ch. 7, sec. 13; 7 W. IV., ch. 19, secs. 2, 5; 13 & 14 Vic., ch. 67, secs. 53, 57.

The facts of the case are stated in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The evidence of distress upon the land was, in our opinion, not such as should have led the jury to regard the sales as invalid. The lot was wholly in a wild state, no one living on it, and none of it cleared. It was proved to have been regularly inspected for the purpose of ascertaining whether there was any thing on the lot that could be seized, and the person who made that inspection for the sheriff swore there was not any thing.

All that is pretended on the part of the defendants is, that at that time there were two or three persons who were in the habit of going upon the back part of the lot and making sugar there: that they had sap troughs which they used to leave on the land, and two sugar kettles, which they also used to leave in the woods, sometimes removing them if they wanted them for other uses, and afterwards taking them back again.

This evidence was not satisfactory even to the extent to which it went, and the value set on the two kettles would

hardly shew them to have been worth as much as the whole amount to be levied, though perhaps they might be worth very nearly as much. The defendants' title ought not to have been held invalid, and at this distance of time, by the inability of the purchasers at sheriff's sale to repel evidence of that description. An unoccupied and unimproved lot would be assumed to contain nothing on it that could be distrained, and no person would think of penetrating into all parts of it to see whether some person not living upon it might not have concealed among the bushes or in the swamps something that might be seized. If such a ground of defeating a sale for taxes were sustained, it would be easy for any person to have kept himself always in a position to reclaim his land by shewing that he had some chattel concealed in the woods which would have been sufficient to have produced the amount of tax if the sheriff's officer could have found it. The law, however, has been lately so altered, though not in time to affect this case, as to protect purchasers at sales for taxes from having their titles impeached, even by clear proof that there was distress upon the land which was notoriously open to view. It has been thought better not to allow that circumstance to affect the title, but to give instead a remedy against the sheriff, if he sells the land without necessity.

The plaintiff, however, has objected upon another ground, to the title of the defendants under the respective deeds from the sheriff. It is contended that each deed being only for a portion of the lot number 15, it is not sufficiently certain upon the face of the deeds what land each is to cover.

The deed made to Broeffle in 1841, was for thirty acres of the lot, *to be measured according to the statute*. That we think, under the fair construction to be given to the deed, must be taken to mean thirty acres taken according to the method directed by 6 Geo. IV., ch. 7, sec. 13, for that the sheriff had not exercised the direction given to him by the subsequent act 7 W. IV. ch. 19, sec. 5, by laying out the thirty acres in any other manner.

The description in McDougall's deed is more difficult to deal with, for it conveys merely twenty-five acres of lot

number 15, not describing in any manner which twenty-five acres. That deed was made in 1851, under a sale for taxes made in 1846. The statute 13 & 14 Vic., ch. 67, secs. 53, 57, therefore do not apply in this case, further than to shew the intention of the legislature expressed before this deed was given, that the land sold by the sheriff for taxes should be so described in his deed to be afterwards given as to shew clearly what land he had sold and was conveying.

We cannot hold, we think, that the description in this deed gives us any information, for in that the sheriff has not, as in the other deed, stated that he sold twenty-five acres to be taken out of the lot according to the general direction of the statute, nor does he state in any way what land he sold.

It has been argued that the sheriff, having given no intimation of any other method of measurement than that prescribed by 6 Geo. IV., ch. 7, we may infer that he did sell twenty-five acres to be so measured. But we think he should at least have said so, and that to hold this deed to be sufficient would be to countenance too great a degree of irregularity, and would be contrary to the policy of the law, and the evident intention of the legislature, and would lead to inconvenient consequences, for the inference that the sheriff did sell land according to a figure corresponding with the proportions of the whole lot might turn out to be contrary to the fact, and might operate most unjustly. And we do not think we could apply the principle of election to such cases, for here we have statutes which direct that it shall be known at the time of the sale what has been disposed of, and the purchaser could not be allowed to choose any other part.

We think the defendants' rule for a new trial must be made absolute without costs, unless the plaintiff will assent to have the verdict so entered as to exclude the tract of twenty-five acres last sold by the sheriff.

DARLING AND DANIELS V. MCINTYRE, SHERIFF.

Assignment—22 Vic., ch. 96, sec. 19.

An assignment for the benefit of such creditors as should execute it within thirty days, and agree to release the assignor,
Held, void under the 22 Vic., ch. 96, sec. 19.

ACTION for falsely returning to a *fi. fa.* from the county court against one C. T. Leclaire, at the suit of these plaintiffs, that the said Leclaire had no goods, averring that there were goods sufficient, but that the defendant neglected and refused to seize them.

Pleas.—1. Not guilty. 2. That the debtor had no goods of which defendant had notice, whereof defendant could have made the debt, &c.

At the trial at Cornwall, before *Richards, J.*, it appeared that on the 7th of January, 1859, Charles T. Leclaire made an assignment under seal of all his estates, goods and effects, to William S. Macfarlane and James Schreiber, of Montreal, merchants, in trust to sell the same, and divide the proceeds rateably among such of his creditors as should execute the assignment within thirty days, and should agree to release the said Leclaire from all further payments, in consideration of the assignment. Any surplus above what might be required for paying all charges of the trust, and satisfying the debts in full of such creditors as should execute within thirty days, was to be paid over to Leclaire. No provision was contained in the deed for giving notice of the intended assignment to any creditor: but it was proved that these plaintiffs did know of the assignment, and declined to become parties to it.

The trustees, in February, soon after taking the assignment, sold out all that had been assigned to Leclaire's father, for as much as would pay 5s. in the pound to the executing creditors upon their debts, taking his estimate of the value of the property assigned.

The father, who was a farmer living some miles off in the country, attended afterwards occasionally in the shop, but the son was there as before, though said to be acting as clerk. The father, according to the evidence, made some purchases of other goods, and mixed them with those that had been

assigned to him by the assignees before the writ came to the sheriff; but it appeared not to be doubtful upon the evidence that there were more than enough of the goods left which had belonged to his son, the execution debtor, to satisfy the plaintiff's debt.

It was contended that the plaintiff was entitled to recover on the ground that the assignment by Leclaire for the benefit of his creditors, to which the sheriff gave way, was void as against the plaintiffs.

1. Because it contained a resulting trust in favour of the debtor, the surplus of the proceeds of the goods being to be returned to him.

2. Because those creditors only were to be allowed to share who should come in within thirty days, and should give a discharge to the debtor in full.

3. Because the estate assigned was shewn to be worth £2040, while the creditors who came in at 5s. in the pound would receive only £251.

4. Because the assignment was within the prohibition in the 22 Vic., ch. 96, sec. 19.

Leave was reserved to move to enter a verdict for the plaintiff; and the jury found for defendant.

Harrison obtained a rule *nisi* to enter a verdict for the plaintiff for £58 10s. 11d., pursuant to leave reserved. He cited *Burritt v. Robertson*, 18 U. C. R. 555; *Maulson v. Peck*, 18 U. C. R. 113 i; *Halsey v. Whitney*, 4 Mason 206; *Seaving v. Brinkerhoff*, 5 Johns. C. C. 329.

Richards, Q. C., shewed cause, and cited *Harland v. Binks*, 15 Q. B. 713; *Morewood v. South Yorkshire R. W. Co.*, 3 H. & N. 798.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the goods which Leclaire the younger assigned to McFarlane and Schreiber by the instrument given in evidence, did not pass to the assignees, for the assignment came within the prohibition contained in the 19th clause of 22 Vic., ch. 96, and, as I think, within both of the prohibitions contained in that clause.

The terms of the assignment excluded all creditors from participating who would not agree to release young Leclair in full, and it cannot be said that it was made for the purpose of paying all the creditors of the debtor all their just debts.

The circumstances are themselves certainly suspicious, and we cannot say that the evidence shews such a change of possession as dispensed with the necessity of filing the deed.

The defendant has relied on the case of *Morewood v. The South Yorkshire R. W. Co.*, (3 H. & N. 799.) That turned upon the effect of the statute 13 Eliz., ch. 5, in rendering assignments void which are made to defeat or delay creditors. The 6th section of that act saves the interests of persons who after the assignment purchase from the assignee *bonâ fide* and for good consideration. Our statute, 22 Vic., ch. 96, contains no such saving, and if it should be held notwithstanding that such purchasers from the assignee can be protected against the operation of the statute, which enacts that assignments made contrary to that act, shall be deemed and taken to be absolutely null and void as against the creditors of the person making the assignment, we must say we could not upon the evidence given in this case regard Leclair, the father of the debtor, as a *bonâ fide* purchaser for value. That however it was perhaps not intended that we should pronounce upon.

We make the rule absolute to enter a verdict for the plaintiff for £58 10s. 11d.

Rule absolute.

GURNEY ET AL. V. JAMES.

Lien on chattels for work—Assignment thereof—Chattel Mortgage Act.

One Robins had agreed to make for Ruthven, the execution debtor, an iron fence, for which Ruthven furnished him with the iron, and paid a certain sum on account of the work. Being unable to pay the balance, G. advanced the money, taking Ruthven's note, and the fence, which was then in Robins' yard, was delivered by Ruthven to him to hold for G. until payment of the note, but there was no written assignment. When the note fell due Ruthven authorised G. to sell the fence, but it remained until it was seized under an execution against Ruthven. *Held*, that the execution could not prevail against G's claim.

This was an interpleader issue to try whether a quantity

of iron rails for fence was or was not the property of the plaintiffs, at the time that a writ of *fieri facias* against the goods of one Ruthven, at the suit of James, the defendant in this issue, was put into the hands of the sheriff.

At the trial at Hamilton, before *Robinson*, C. J., Ruthven, the defendant in the *fi. fa.*, had bargained with one Robins to make for him about 260 feet of iron railing for a fence, paying \$640 for the iron to some other party, and leaving it with Robins to make up.

When the fence was finished Robins had a charge against Ruthven of \$145 for making it, and pressed for the money; but Ruthven, although, as he swore upon the trial, abundantly solvent in point of property, was not able at the time to pay for it, and applied to these plaintiffs, Messrs. Gurney & Carpenter, to advance the money to Robins for him, which they consented to do, upon condition that the fence, which had never been out of Robins' possession, nor off his premises, should be transferred and delivered to them, and that Robins should hold it for them until they should be repaid their money by Ruthven, whose promissory note they took for the amount.

This transaction took place on the 16th of April, 1858.

Ruthven made a formal delivery of the fence to Messrs. Gurney & Carpenter, in Robins' yard, and desired Robins to hold it for them until he should repay them the money lent.

The fence was painted in the meantime to save it from rust.

Ruthven swore that no written assignment or mortgage of the fence was made, but that the transaction was real and *bonâ fide*, and that there was no judgment then against him.

In February, 1859, Ruthven not having paid his note, and the fence remaining on Robins' premises, Robins was directed to sell it; but before it was sold the defendant's execution against Ruthven came to the sheriff, and he seized the fence as being still the property of Ruthven.

Robins was examined as a witness, and fully confirmed Ruthven's account of the transaction. He stated that it was two years ago since he began to make the fence, and that it

had never been out of his possession : that the plaintiffs, Gurney & Co., paid him his bill against Ruthven : that Ruthven agreed in his presence to give them the fence in security ; and that by Ruthven's sanction he held it from that time for the plaintiffs.

The learned Chief Justice held that the chattel mortgage act did not apply to the goods under the facts proved, for that in effect the plaintiffs had bought Robins' lien upon the fence, which never had been in Ruthven's possession, and was not in fact his ; but he reserved leave to the defendant to move to have a verdict entered in his favour.

McKelcan obtained a rule *nisi* to enter a verdict for defendant pursuant to leave reserved, on the ground that there was no actual and continued change of possession of the goods claimed at and after the time that Ruthven, as the defendants alleged, assigned the iron railing to them, nor any bill of sale filed with the county clerk, pursuant to the statute. He cited *McLeod v. Hamilton*, 15 U. C. R. 111.

Burton, shewed cause, and cited *Harris v. The Commercial Bank*, 16 U. C. R. 437.

ROBINSON, C. J.—My brothers agree in the view of the case taken by me at the trial, and are of opinion that the rule for entering a verdict for the defendant, upon the leave reserved, should be discharged.

The chattel mortgage act does not, we think, apply to such a case, for Ruthven had never the property in his possession, nor had he a right to possess it till he had paid or tendered Robins the amount of his charge for making it.

No creditor of Ruthven had reason to imagine from appearances that the property belonged to him. Robins had a right to detain it, as against Ruthven, and having that right he agreed, with the consent of Ruthven and of these plaintiffs, to hold it until Ruthven should by repaying the money advanced entitle himself to the article.

In the meantime the execution came, but the plaintiffs in the execution could not insist upon that being seized as Ruthven's property which Ruthven was not at that time, and never had been, entitled to take possession of as his own.

McLEAN, J.—At the time of the delivery of possession to Robins to hold for the plaintiff, there were no executions, at least none were shewn to exist, which could affect the property, and the plaintiffs being put in possession, and holding thereafter by their agent, Robins, were not under any necessity of taking an assignment in writing, or of registering such an assignment. Ruthven, after the delivery to Robins for the plaintiffs, could not have taken the fence out of Robins' possession without the authority of the plaintiffs, and if he had done so the plaintiffs could have recovered it from him. It is not probable that a fence which cost so large a sum was intended to be absolutely assigned to the plaintiff for any other purpose but to sell, in order that they might realise their own money, but while they held it for that purpose no person had a right to deprive them of it. If the defendant, instead of seizing the fence as the property of Ruthven, had sold his equity of redemption, he would probably have been justified in so doing, because there can be no doubt that the delivery to Robins for the plaintiffs was, in the first instance, as a security for the amount of the plaintiffs' advance. Afterwards, on the 1st of February, 1859, the plaintiffs were authorised in writing to sell the fence. The very fact of giving such authority shews that the fence was not regarded otherwise than as security up to that time; then the giving of such authority could not change the nature of the plaintiffs' claim; it could only facilitate the plaintiffs' recovery of the amount due to them.

Upon the evidence, however, I think the verdict is correct, and that the fence was in fact the property of the plaintiffs as against the defendant, at the time of its seizure.

BURNS, J., concurred.

Rule discharged.

CRAPPER V. PATERSON ET AL.

Interpleader—Evidence—Assignment—Provision for release, and for carrying on the business.

On an interpleader issue to try the title to certain goods seized, the plaintiff claimed all, asserting that he had derived some by purchase from the assignee of the execution debtor, and others by subsequent purchase from third parties. The assignment being invalid: *Held*, that it was necessary for him to shew what goods he was entitled to without it, and on his failure to do this that the jury were rightly directed to find for defendants.

An assignment made before the 22 Vic., ch. 96, in favour of those creditors only who should execute within a certain time and release the debtor, *Held*, void.

It contained also a provision that the assignee might carry on the business for the benefit of the creditors executing, and employ the debtor to manage it, at such salary as might be agreed on, and might supply goods to keep up the stock, and for the more beneficial management of the business for the interests of the creditors, and pay for the goods as supplied out of the trust estate.

Quære, whether this would make the executing creditors partners in the business.

APPEAL from the county court of York and Peel.

This was an interpleader issue, to try whether certain goods seized under a *fi. fa.* delivered to the sheriff on the 17th of November, 1858, at the suit of John and Charles Paterson against J. S. Dennis and James Crapper, were at the time of the delivery of the said writ to the sheriff, or at any time during the currency thereof, the property of Benjamin Crapper (the plaintiff in the issue) as against the said John and Charles Paterson.

The plaintiff claimed under a purchase from one J. G. Beard, the assignee of the execution debtor, James Crapper, who was the only witness examined at the trial for the plaintiff. His evidence was as follows:—

“I was a plumber and gas-fitter. I made the assignment produced, to J. G. Beard, on the 8th of December, 1857. I owed Beard for arrears of rent and for moneys advanced. After the assignment was made Beard carried on the business, and employed me until the 16th of April, 1859, when he assigned to Benjamin Crapper, the plaintiff. Materials were got that were necessary to finish the work. I am working with the plaintiff, and am employed by him. Of old stock included in the assignment to Beard what there is I cannot tell. The furniture is now just as it was. Schreiber's claim was for an endorsation of £100, Lewis' was for £250 for goods furnished, Anderson is for £78 for

money lent. They all concurred with Beard in the sale to the plaintiff. I am a journeyman only at \$10 per week. I have no interest. The plaintiff was a mechanic, but when he came to this country he went to farming. The plaintiff has purchased goods to a considerable amount himself. Since he purchased from Beard, all the goods in the store were seized.

Cross-examined.—My liabilities were about £1300 at the time of the assignment. The stock and debts were together £1668, stock taken at selling price. The debts due to me were £773. The stock and debts were worth more than I owed. I made the assignment because I was pushed. Beard took the key and possession, and afterwards I made arrangements with him. He was often there afterwards. I and my son kept the books, received moneys, and paid the wages. There were executions before the assignment in the sheriff's hands, to the amount of £250. I paid the rent and taxes to Beard; in all I paid out £1258. I paid to Beard £190. Lewis was paid off; Anderson was not paid. I used the furniture myself until the plaintiff bought; he has it now. I board with him. The goods purchased in Beard's time were bought by proceeds of business as made. The plaintiff gave 10s. in the £ for the stock and furniture, and 7s. 6d. for the book debts. The creditors consented. Lewis was not then paid, but he was afterwards paid by Beard. Schreiber and Anderson were promised to be paid. The plaintiff paid for assignment £100 cash down, and gave notes for £658 at different dates, secured by a chattel mortgage on the same property.

Re-examined.—The plaintiff had the whole control since he bought; he keeps the books and attends to every thing."

Certain objections were taken to the assignment, the nature and grounds of which sufficiently appear in the judgment of this court.

The learned judge ruled that the plaintiff should point out what goods were his, independently of the assignment, and that not having done so the jury should find for defendants, which they did.

The plaintiff objected to this charge, and appealed from the judgment discharging a rule *nisi* for a new trial on the ground of misdirection.

M. C. Cameron for the appellant. *Eccles*, Q. C., contra.
Owen v. Body, 5 A. & E. 28; *Maulson v. Peck*, 18 U.

C. R. 113; Hickman v. Cox, 18 C. B. 617; White v. Garden, 10 C. B. 919; Harland v. Binks, 15 Q. B. 713; Pickering v. Busk, 15 East 43; Perrin v. Davis, 9 C. P. 147; Boys v. Smith, 9 C. P. 27; Higgins v. Burton, 26 L. J. Ex. 342; Morgan v. Marquis, 23 L. J. Ex. 21, were cited on the argument.

ROBINSON, C. J., delivered the judgment of the court.

This appeal we think should be dismissed.

The plaintiff claimed all the goods which the sheriff had seized, and in support of his claim called as a witness the person who made the assignment, to prove the circumstances under which it was made.

The evidence given, and more especially the provisions of the assignment under which the plaintiff claimed, shew that if it could be upheld for any part of the goods, which we doubt, it could not be upheld for the whole; but the plaintiff gave evidence that some of the goods seized had been bought by himself of third parties, and added by him to the stock that had been assigned to him.

There was ground, we think, for making it a question for the jury whether such purchases of new goods were not made in truth for James Crapper, and out of the proceeds of goods that were still his, and whether the whole business was not in fact carried on for his benefit, on an understanding with his creditors. But as the assignment made in December, 1857, could not in our opinion be allowed to hold against creditors, and as the *fi. fa.* was delivered to the sheriff long before the assignee had sold the goods to the plaintiff, if there were goods among these goods which were the property of the plaintiff, independently of any title under the assignment, he ought to have given proof of such goods, and claimed a verdict in respect of them. Without such proof the jury could not limit their verdict, and as the plaintiff claimed all that the sheriff had seized, and was not entitled to all, he could in our opinion recover for none without shewing to what articles he had a title. The onus lay upon him.

The assignment by James Crapper was made before the statute 22 Vic., ch. 96 was passed, and so no objection could

be taken to it under that statute, (sec. 19.) But it was void, we think, because it contained a release in full from those creditors who should execute, and no creditor could receive benefit from it who did not execute within a certain time, submitting to that condition. It provided also for the payment over to the debtor of any surplus, after satisfying such creditors as should execute, and it contained a stipulation that the assignee, Beard, "his executors, administrators and assigns, might carry on the business then carried on by the debtor, for the benefit of the executing creditors, and might employ the debtor to manage the business, and pay him such salary as might be agreed upon; and might supply goods for the keeping up of the stock, and the more beneficial management of the business for the interests of the creditors; and might pay for the goods so supplied out of the proceeds of the trust estate."

Whether the effect of those last provisions would be to make the creditors who should execute the deed liable as partners in the business to be thus carried on, must perhaps be treated as uncertain till the case of *Hickman v. Cox*, (3 C. B. N. S. 523,) which is now pending on appeal before the House of Lords, shall be finally determined. But we consider that the case of *Owen v. Body*, (5 A. & E. 28,) is at least an authority to shew that the conditions in this assignment in regard to carrying on the business were such as the creditors could not be expected to submit to, and therefore that they affect the validity of the assignment as it regards non-executing creditors.

The authority of *Owen v. Body*, as bearing upon that point, rather than upon the question whether the stipulation had actually the effect of making the creditors partners, is fully recognised by the judges in *Hickman v. Cox*, in the Exchequer Chamber.

Appeal dismissed.

MARKLE ET AL. V. HOUCK AND WINKLER.

Hay scales—Fixtures as between vendor and vendee.

One J. sold the land in question to W., who took possession under the contract for sale, and erected a set of hay scales, partly upon it and partly upon the street. A pit was dug about three feet deep, which was boarded inside, and posts were let into the soil to hang the scales upon and as rests. The platform rested upon posts thus let in, and hung upon hooks in the posts, so that the scales might be removed by lifting it up, without disturbing the posts or boards. The earth was banked up on the outside so that teams could drive upon the platform. W. could not carry out the contract, and with his consent J. sold the land to the plaintiffs, and conveyed it to them by a deed in the usual form, in which nothing was specified as to the hay scales. The defendants, W. and another, having removed them, taking away all except the posts:

Held, that they were not fixtures as between J. and his vendees, the plaintiffs, and that they therefore did not pass by the conveyance.

The first count of the declaration alleged that before and at the time of the committing of the grievances complained of, the defendant Winkler was in possession as tenant to one Johnson, or as occupant under Johnson, the reversion then being in the plaintiffs, of all that parcel of land, &c., in the Township of Woolwich, containing half an acre, describing it by metes and bounds. Yet the defendant, well knowing the premises, but wrongfully intending to injure the plaintiff's reversionary interest, whilst the premises were in the possession of Winkler, on the 23rd of May, 1859, and on other days, wrongfully dug up, prostrated, and destroyed divers posts, logs and beams, then sunk and let into the earth and freehold, for supporting hay scales then appurtenant to the said close and affixed to the soil thereof, and took and carried away the beams, logs, timbers and scales, and made upon the said close divers holes and ditches of great length, breadth and depth, by means of which the plaintiffs have been injured in their reversionary estate in the said close so in the possession of Winkler.

The second count was for trespass to the same, and carrying away the hay scales, &c.

The third count was in trover for the hay scales, and the frame and timbers to support the same.

Pleas.—1. As to the digging up and prostrating the posts, logs and beams, and carrying away the same, in the first count mentioned, not guilty.

2. As to the taking and carrying away the hay scales in the first count alleged, that the scales were not appurtenant to the said close, and affixed to the soil thereof as alleged, nor were they the property of the plaintiffs.

3. As to the making holes and ditches in the first count alleged, that the defendants made the same by the leave and license of Johnson, and while Johnson owned the fee, and before the plaintiffs had any interest in the close.

4. As to the breaking and entering the close in the second count alleged, that before the committing of the trespasses the said close, and the right to the possession thereof, belonged to Johnson, and that Johnson for good consideration gave leave and license to the defendant Winkler, and his servants and agents, to occupy and possess the said close for the space of time covering the period when the defendants are charged with having committed the trespasses in the second count mentioned, and that Johnson, after giving such license, and while Winkler was in possession, sold and conveyed the close to the plaintiffs, and they purchased subject thereto; and the defendants say that Winkler not having been notified to give up possession after such sale and conveyance, during the continuance of the license took the other defendant Houck thereon, which are the alleged trespasses in the introductory part of the plea mentioned.

5. As to the digging up, prying up, and tearing down and carrying off the beams, &c., mentioned in the second count, not guilty.

6. For a further plea, as to the taking and carrying away the hay scales in the second count alleged, the defendants say the same were not the property of the plaintiffs, but were then the property of the defendant Winkler, and that he in his own right, and Houck as his servant, took and carried the same away.

7. As to the conversion in the last count of the hay scales, that the hay scales were not the plaintiffs' property.

8. As to the conversion of the frame and timbers in the last count, not guilty.

The trial took place at Berlin, before *Burns, J.*, and the facts of the case appeared to be these. Johnson, mentioned

in the pleas and declaration, was examined as a witness. He was owner of the premises some three years before, and had agreed to sell to Winkler, and Winkler was let into possession on a contract of sale. While he was so in possession under such contract Winkler erected the hay scales in question. They were not erected wholly upon the close, but were so in part only. About half, or more perhaps, was upon the street, and the remainder on the close in question. A pit was dug out about three feet deep and thirteen feet square. Posts were then let down into the soil, in order to hang the scales upon, and as rests. This pit was boarded inside, and inside thereof the machinery of the scales was placed. The platform rested upon some six or eight posts thus let into the soil, by means of a frame, and hung upon hooks inserted into the posts. The earth was banked up around on the outside of the pit to a level with the platform, so that teams could easily drive upon the platform. The scales might be removed by lifting up the platform from the hooks and posts upon which the whole rested, without disturbing the posts, or the boards enclosing the pit.

Winkler not being able to complete his purchase, assented that Johnson should sell the premises to the plaintiffs, and Johnson did so, and conveyed to them by a deed executed on the 20th of May, 1859. Nothing was said in the conveyance specifically of the hay scales, but it was the usual conveyance of the premises, with all appurtenances, &c., thereto belonging. A good deal of conversation passed between the parties about the scales at the time of the purchase, as to whether they were to be part of the purchase or not. Two witnesses stated that they were present at the bargain between the plaintiffs and Johnson, and that the plaintiffs stated if they were not to have the hay scales they would not buy, and they understood that Johnson treated the scales as part of the propesty for which he was receiving a consideration, and that they were to belong to the plaintiffs. Johnson himself stated that when selling to the plaintiffs the scales were spoken of, but he would not say that he was conveying them to the plaintiff, or that he was not, but the plaintiffs, he said, understood they would

have a lawsuit about them upon taking the conveyance from him. He said the plaintiffs were advised they could hold them under his conveyance, and then they purchased.

The defendants on the 23rd of May, 1859, assembled together some twenty or thirty persons, and removed the scales by force. They dug around the pit and removed the earth, and then used levers for forcing up the scales. They removed every thing but the posts, which were let into the earth, and those they left standing where let in.

Upon this evidence the learned judge directed the jury to assess damages, computing the value of the hay scales, and also for the trespass to the freehold. The jury found one sum only, £45, being the value of the scales, which was entered in the plaintiffs' favour, and leave was reserved to the defendants to take the opinion of the court upon the point whether the plaintiffs were entitled upon this evidence to consider the hay scales as a fixture or part of the freehold. The judge was to adjust the finding as to the different issues upon that point being determined.

Freeman, Q. C., obtained a rule *nisi* for a new trial, on the ground that the scales formed no part of the freehold, and were not appurtenant to the freehold, or to enter the verdict for the defendants upon the first, third and fourth, fifth, sixth and eighth issues. He cited *Trappes v. Harter*, 3 Tyr. 603; *Walmesley v. Milne*, 1 L. T. Rep. N. S. 62; *Carscallen v. Moodie*, 15 U. C. R. 304.

M. C. Cameron shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

In our opinion the evidence did not shew the hay scales to be fixtures as between the vendor, Johnson, and his vendees, the plaintiffs, and the scales did not become the property of the plaintiffs, as being an article affixed to the freehold, and therefore going with the land to them.

The fact of their being erected in great part upon the street, and only in part on the land bought by the plaintiffs from Johnson, would be very material, if there were nothing else against the plaintiffs' right to claim the scales; but

independently of that, we consider the scales as not being a fixture on the lot that Johnson had owned, though the platform was affixed, being imbedded in the soil, and the posts were also affixed. The scales could be lifted off the hooks, according to the description given, and it cannot reasonably be said that the scales were necessary to the enjoyment of the lot for the purpose for which the lot had been acquired, as the machinery put up in a mill is.

On several of the pleas no doubt the plaintiffs should have a verdict. The jury were requested to find what the value of the scales was, and also what damages they thought the plaintiffs entitled to for entering upon the land and tearing up the platform. They found only one sum, however, which we take to be their estimate of the value of the hay scales, and for that sum we think the plaintiffs were not entitled to recover.

The defendant, Houck, it seems, was a purchaser at sheriff's sale under an execution against Winkler's goods, and it was proved by the bailiff that he did not sell these scales. If he did not, then they remained Winkler's, not being fixtures, as we think. In our opinion the evidence shewed that the defendants are liable to damages only for tearing up the platform and disturbing the soil which was heaped up around it. No doubt the injury intended to be complained of was the taking away the hay scales.

Upon the plaintiffs consenting to have a verdict entered for nominal damages only, the rule may be discharged, otherwise a rule to issue for a new trial, costs to abide the event.

THE QUEEN V. McELDERRY ET AL.

Indictment for libel—Notice to prosecutor of intended publication—New trial.

Upon an indictment for libel, published at defendants' instance in a newspaper, it appeared that the editor, (who was not indicted,) before inserting the libel shewed it to the prosecutor, who did not express any wish to suppress the publication, but wrote a reply, which was also inserted. *Held*, not such a defence for the parties indicted as to render a conviction illegal, and a new trial was refused.

The defendants were tried at Guelph before *Burns, J.*,

upon an indictment for libel, upon the prosecutor Brown, and another person.

Adam Wilson, Q. C., obtained a rule *nisi* for a new trial.

M. C. Cameron, and *R. A. Harrison*, shewed cause, citing *Davison v. Duncan*, 7 E. & B. 229; *Regina v. Beckwith*, 8 C. P. 274.

The facts of the case are stated in the judgment of the court, delivered by

ROBINSON, C. J.—There is no doubt that the alleged libel, which was published in a newspaper in the shape of resolutions passed at a public meeting, reflected very severely upon the prosecutor, and that it was really in its character libellous.

The publication by defendants, that is, at their instance, was shewn, and indeed was not disputed.

If, therefore, the jury found it to be a malicious libel, the defendants were properly convicted, and the jury did so find.

But the defendants insisted that they ought to have been acquitted of publishing maliciously, on the ground that the prosecutor himself authorised the publication, and inserted in the same newspaper an answer to it.

The conductor of the paper, to whom it was taken for publication, seems to have been startled by the severity of the comments contained in these resolutions upon Brown's conduct and character, and before he would insert it he took it to Brown, to make him aware of what was intended, and perhaps to give him an opportunity to remonstrate, or at least to take any notice of it that he might desire. Mr. Brown seems to have been indignant, but he did not either intimate any apprehension of injury to his character, or any desire to suppress the publication, and he wrote and gave the editor of the paper a reply to the resolutions, which was inserted, and in which he vindicated his conduct from the aspersions made upon him in the resolutions.

We think we cannot fairly look upon what Brown said or did as holding out any assurance of impunity to the defen-

dants as the writers of the resolutions, or as giving permission to any one but the editor of the paper, whom he could not afterwards have complained of with justice, since he told him he might insert the resolutions if he pleased, and that he, Brown, would answer them.

The publication by the defendants had been completed before any thing passed between Brown and the editor, and though the manner in which Mr. Brown received the intimation kindly given to him by the editor may be fairly urged perhaps as approaching to a defence that might be set up by the parties indicted, and might have great weight given to it in awarding the punishment to follow upon the conviction, we are not of opinion that the conviction was illegal or improper, and we discharge the rule.

Rule discharged.

WHITTIER, ASSIGNEE OF THE SHERIFF OF HURON AND
BRUCE V. HANDS.

*Bond to the limits — Power of plaintiff's attorney to allow a departure —
Effect of departure without plaintiff's leave.*

The plaintiff's attorney cannot authorise a departure of defendant from the limits, to which he has been committed on a *Ca. Sa.*

Semble, that if defendant departs by plaintiff's permission, and returns, the bond is not thereby gone.

ACTION on a bond to the sheriff, given by the defendant as bail for the limits for one Holmes, committed on a *Ca. Sa.* from the Queen's Bench, alleging a departure from the limits.

Pleas.—1. Traversing the assignment of the bond; and, 2, that Holmes departed from the limits with the consent and by the leave and license of the plaintiffs, and without the consent of the defendant. (*a*)

Issue was joined on last plea.

At the trial at Goderich, before *McLean*, J., the jury found a verdict for defendant.

Richards, Q. C., obtained a rule *nisi* for a new trial, with-

(*a*) This plea was demurred to, and held a good defence. The demurrer is reported in 18 U. C. R. 295.

out costs, on the law and evidence, there being no evidence to support the verdict on the *first issue*, and no evidence of leave given by the plaintiff, or any one by his authority, to Holmes to leave the limits; and for misdirection, in directing the jury that if the first departure took place with the consent of the plaintiff, the condition was gone, and defendant could not be held liable for any subsequent departure; and that a consent given by the plaintiff's attorney would be binding on the plaintiff. He cited *Brock v. McLean*, Tay. Rep. 548; 1 Saund. 288 note *x*; *Hodges v. Paterson*, 26 L. J. Ex. 223; C. L. P. A., sec. 191.

Hector Cameron shewed cause, and cited *Savory v. Chapman*, 11 A. & E. 829; *Connop v. Challis*, 2 Ex. 484.

The facts of the case sufficiently appear in the judgment on this rule, and on the second application for a new trial, *post* page 172.

ROBINSON, C. J., delivered the judgment of the court.

The evidence given upon the trial in support of the defendant's plea, that the debtor Holmes departed with the leave of the plaintiff, did not in our opinion prove that plea to be true.

There was no evidence whatever that the plaintiff in this suit gave any permission to depart from the limits. The defendant relied wholly on a permission alleged to have been given by the attorney of the judgment creditor, who could not bind his client by such an act, being his attorney to collect the debt, not to discharge the debtor without payment. But besides this, there really was no such permission given by the plaintiff's attorney, when the evidence is considered, and if there was, there is no pretence for saying that it had any thing to do with the departure complained of.

The defendant's counsel contends that if leave was given to the debtor, at his request, to depart any short distance from the limits for any temporary purpose, and he returned according to his promise, he might afterwards at his pleasure go away, and remain away, for that the bond was gone by the permission first given. I do not at present accede to that, for I incline to think that the word "depar-

ture," in the condition of the bond, means a wrongful departure, which a departure with leave would not be.

But if that principle could be so applied, it would shew that we ought in justice to the creditor to be strict on the other side, in seeing that the permission which is to have such an effect was given either by the creditor himself, or by some one who had his authority to bind him by such an act; and further, that the permission was given in unequivocal terms, nothing of which we think was established by the evidence in this case.

We think the rule should be made absolute for a new trial without costs.

Rule absolute.

THE SAME CASE.

Bond to the limits—Competency of deputy-sheriff as witness to assignment—Departure with plaintiff's leave—Second departure—New assignment.

The deputy-sheriff is, under the 4 Anne, ch. 16, sec. 20, a credible witness to the execution by the sheriff of an assignment of a bond to the limits.

The debtor applied to the plaintiff's attorney for permission to leave the limits, in order to go to Toronto and obtain the money, and the attorney told him he would take no advantage if he wished to go for that purpose. He thereupon went, returned without effecting his object, and after remaining some time left the province. The plaintiff then sued upon the bond.

Held, that there was no evidence to sustain a plea that the debtor departed with the plaintiff's leave, and that it was unnecessary to new assign the second departure. (a)

The second trial of this case took place at Goderich, before *Richards, J.* The execution of the bond was proved by the deputy-sheriff, who was a witness to it, with another person.

The defendant's counsel raised the objection that the deputy-sheriff was not a credible witness within the statute of 4 Anne, ch. 16, sec. 20, and the learned judge reserved leave to the defendant to move to enter a nonsuit on this point.

The defendant then attempted to prove his plea, that the debtor was allowed to leave the limits by the permission of the plaintiff. The evidence to prove this, was that Holmes, the debtor, while upon the limits, applied to the plaintiff's attorney for permission to go from the county of Huron to

(a) Decided in Easter Term, 1860, but reported here on account of its connexion with the previous decision.

Toronto, to endeavour to obtain the money to pay the debt. The attorney would give no other answer than this : that if the debtor wanted to go to Toronto for the express purpose of obtaining the money, he, the attorney, would take no advantage of that. The debtor did then go to Toronto, but failed in obtaining the money, and he returned to the limits in the county of Huron, and remained there some months, and then finally left the province, and went to California, whereupon the plaintiff obtained an assignment of the bond for the limits, and brought the present action.

The learned judge told the jury that he did not think the evidence sustained the plea, and that they should find for the plaintiff. The jury found accordingly.

Hector Cameron moved for a rule to shew cause why a nonsuit or verdict should not be entered for defendant, pursuant to the leave reserved, or why there should not be a new trial on the ground of misdirection ; and also that upon the evidence the plaintiff should have new assigned the fact of the debtor leaving the limits a second time to go to California. He cited *White v. Barrack*, 1 M. & W. 424; *Rosc. N. P.* 479.

BURNS, J., delivered the judgment of the court.

With regard to the point reserved, Mr. *Cameron* relies upon the case of *White v. Barrack*, (1 M. & W. 424,) as establishing that the deputy-sheriff is not a credible witness, within the meaning of the act. The case, instead of establishing the proposition contended for, proves the very reverse in this case. Here the sheriff himself assigned the bond, and the deputy-sheriff witnessed it. What the court stated in the case cited, was that the plaintiff himself, as he could not be a witness in the suit, was not a credible witness within the meaning of the act. Nor could the deputy-sheriff, if he acted as the attorney of the sheriff in executing the assignment, which he might by law do, witness his own signature.

The learned judge was quite right in telling the jury there was in truth no evidence to sustain the plea that the debtor left the limits with the leave and license of the plaintiff.

The action was not brought on account of the debtor having gone to Toronto on the occasion spoken of, but because the debtor had left the province altogether. The attorney saying that he should take no advantage of the debtor going to Toronto to raise the money to pay the debt, was not giving the debtor permission to break the condition of his bond, for the debtor took the responsibility upon himself of going away. There was no occasion for any new assignment, in order to raise the question whether a permission to leave the limits, being taken advantage of, would so far forfeit the bond that it could not be restored again. The debtor took the responsibility upon himself of going to Toronto, because the plaintiff's attorney said he would take no advantage of his so doing, and he did not take advantage of it, but waited until the debtor had broken the bond by withdrawing himself from the province. Whether the debtor proceeding to Toronto was a forfeiture of the bond is of no consequence; he had no permission of the plaintiff to do it, and the plaintiff does not rely upon it.

There should be no rule.

Rule refused.

IBSON AND THE PROVISIONAL CORPORATION OF THE COUNTY
OF PEEL.

County Town of Peel—19 Vic., ch. 66.

Held, that the selection of a county town for the county of Peel, authorised by the 19 Vic., ch. 66, was sufficiently made by resolution, a by-law not being indispensable, and that such selection being final, a by-law passed afterwards appointing another place was illegal.

R. A. Harrison obtained a rule *nisi* to quash a by-law of the county of Peel for selecting a place for the county town of the county of Peel, passed on the 26th of January, 1860, on the ground that the corporation having on the 7th of December, 1859, selected Malton as the county town pursuant to the statute 19 Vic., ch. 66, was disabled afterwards to pass the by-law moved against, for that Malton was then by their previous appointment the county town.

The by-law recited that under the statute 19 Vic., ch. 66,

the provisional council of the county of Peel was authorised and directed, at some meeting of the council to be held after the 1st of February, 1857, to proceed to select a place for the county town of the county of Peel; and that the place so selected should be the county town of the said county, and that it was necessary and expedient to make such selection by by-law; and it enacted, that the village of Brampton be, and the same was thereby selected as the place for the county town of the said county of Peel, and that the said village of Brampton being the place so selected, should be, and was thereby declared to be, according to the said statute, the county town of the said county of Peel.

It was shewn by affidavit that on the 7th of December, 1859, the provisional municipal council of the county met according to the 4th clause of the statute, to select and appoint the site for the county town, and that a resolution appointing Malton the county town was passed, by a vote of 6 to 5 of the members present. This resolution, and others passed at the same meeting, making certain arrangements in pursuance of the first resolution, were certified under the corporate seal, with the signature of the clerk. At the time of passing the resolution the council had no seal.

It was shewn, further, that at a meeting of the provisional council held on the 27th of December, 1859, steps were taken respecting the selection of ground upon which to erect a gaol and court house in the village of Malton, and respecting the procuring plans for such buildings.

On the other hand, it was stated in an affidavit that the meeting of the 7th of December, at which the resolution was passed, selecting Malton for the site of the county town, was a meeting held by adjournment from a meeting that was held on the 5th of December, (two days before,) and was not a meeting called for any special purpose, or with any formality out of the ordinary course: that at the next meeting of the council the report made by a select committee which had been appointed to select ground in Malton for a gaol and court house was not adopted; and that no land for the purpose had yet been selected or acquired, and that the plans for the public buildings had not yet been accepted by the provisional council.

Adam Wilson shewed cause.

M. C. Cameron and *Harrison* supported the rule.

ROBINSON, C. J., delivered the judgment of the court.

There seems to have been no statute passed that can affect this matter since the statute 19 Vic., ch. 66. For the constitution and powers of provisional councils, who are to take the necessary measures for perfecting the separation of a junior county from another to which it had been united, we must refer to the statute 12 Vic., ch. 78. Taking that act and the statute 19 Vic., ch. 66, together, it seems clear that the reeves and deputy reeves for the time being, chosen within the junior county, are to compose the provisional council, which may continue to exist and act as long as may be necessary for carrying out the powers committed to it. There is nothing in the objection taken in arguing this case, that the provisional council could not continue after the first year.

The delay in selecting a site for a county town is not accounted for, and does not seem to us to be material, looking at the terms of the special act 19 Vic., ch. 66.

The first question, then, is as to the selection made of Malton, at the meeting of the 7th of December, 1859. Was that done in a sufficient manner? We think there is no ground on which we can determine otherwise. It does not appear in any thing before us when the vote of the municipal electors of the county was taken which sanctioned the separation from the county of York. For all that appears, it may have been shortly before the selection of the county town. But however that may be, it is not shewn that it was not declared and understood at the meeting of council previous to the 7th of December, that at the meeting to be held on the 7th of December the Council would proceed to select the site of the county town. Nor is it shewn that all the members of the provisional council were not attending at that meeting.

The provisional council, it is sworn, had then no seal, and if they had had one, we are not of opinion that the affixing it to the resolution naming the site of the county town would

have been indispensable, or that the act was one which could only be done by by-law, for it was not an act divesting the corporation of any interest or contracting any engagement with a stranger, or for the purpose of creating any legal interest or authority. It was simply an expression of their choice, made in pursuance of an act of parliament which required them to select; and we do not think that a by-law was necessary, though it would have been more becoming the occasion to use that formality. (a) The statute does speak, in the fifth section, of certain acts to be done by by-law *or otherwise*. In the second section, it directs a certain other act to be done by by-law, and in regard to this matter of selecting a county town, it does not prescribe with what formality it shall be done. It required, we think, to be done at least by a resolution, publicly put and carried, and entered in the minutes of the corporation, but not necessarily by a by-law.

The next question is whether, if Malton was selected in a manner sufficient under the statute, it was in the power of the corporation to change the selection. In our opinion it was not, for they had no general continuing authority over the matter. They were merely empowered to act *pro hac vice*, for the statute indeed says in express words, that the place selected by them at some (that is, at any) meeting to be held by them after the 1st of February following the vote of approval of the separation by the inhabitants, "*shall be the county town of Peel.*" There can be no doubt that the legislature so intended, for the inconvenience attending the exercise of an unlimited power of altering such a decision would be very great.

We fear it is but too obvious, from the few papers before us, that the case may be found to call for legislative interference, for there is an appearance of its being difficult to carry out the selection which has been made, from the difference of opinion existing in the council.

Rule absolute.

(a) See Grant on Corporations, 54-57.

THE CORPORATION OF THE COUNTY OF HALDIMAND V.
MARTIN, SHERIFF.

Sheriff's fees—Panels for County Court and Quarter Sessions—Mileage for summoning jurors—Money had and received—Amount due uncertain—Reference—Right to recover back overcharge—13 & 14 Vic., ch. 55, 14 & 15 Vic., ch. 65, 16 Vic., ch. 120.

The sheriff of Haldimand for many years, since 1853, had charged for the panel of jurors for both the County Court and Sessions, and mileage for summoning each juror according to the distance from the court house to his residence, without reference to the distance actually travelled to serve all. These charges had been paid to him without question, upon the affidavit required by the act verifying his accounts, which did not shew on what principle the charges had been made, nor did it appear that the county council, or their treasurer, were aware of it before making the payments. There was no audit of the sheriff's accounts as between him and the treasurer, who paid him; but the treasurer's accounts, including them, had been regularly audited and passed by the council.

The council sued the sheriff for money had and received, to recover back the overcharge, contending that the mileage had been computed upon a wrong principle, and that he was entitled to charge only for one panel. A verdict was taken, subject to the opinion of the court as to the right; and it was agreed that if in their opinion the defendant was liable to refund any thing, the amount should be settled by the judge of the County Court.

Held—That the sheriff was authorised to charge for both panels, but that he was entitled only to mileage for the distance actually travelled to summon all the jurors.

Held, also, that the overcharge might be recovered back by the county in an action for money had and received. *Burns, J.*, dissenting, on the ground that the statutes afforded room for doubt as to the right, that though the sheriff might have charged too much, the mode of charging contended for by the plaintiff was not correct, and that as the fees had been demanded and paid for many years without question, the sheriff should not be called upon to shew the exact sum to which he was entitled.

This was an action against the defendant for money had and received to the plaintiffs' use, to recover back money paid to him for several years, since 1853, for mileage in serving summonses upon the jurors to serve in the courts of assize and nisi prius, and the Quarter Sessions and County Court, the plaintiffs contending that there had been a great overcharge in the mileage; and also to recover back the charges made for returning the panels of jurors at the courts of Quarter Sessions and County Court, on the ground that an overcharge was made in respect of that item.

The trial took place at Cayuga, before *Burns, J.*

The treasurer of the county proved that he had always paid the sheriff's accounts from time to time, upon vouchers in this form: that is to say, attached to the account of the sheriff against the county, made out, not in detail as respects

the charge for mileage, but in gross, were affidavits of the bailiff and deputy sheriff as follows :

“ Peter Campbell, of the town of, &c., sheriff’s officer, maketh oath and saith, that he did during the month of June last past necessarily travel 591 miles in and about serving jurors for the grand and petit juries for the sessions, and petit jury for the county court, to be held for this county, on Tuesday, the 5th July, 1853.

“ Sworn,” &c.

The affidavit of the deputy sheriff stated,— “ That the above account is just and true, to the best of deponent’s belief and knowledge, and that the services charged therein mentioned were duly performed.”

The receipt of the sheriff to the treasurer was appended at the foot of the account. The sheriff’s accounts for these services were not subjected to any examination or audit, but were always paid by the treasurer on production of the account with the vouchers of the character stated. As between the treasurer and the corporation, his accounts were audited and passed annually, and the auditors passed the treasurer’s accounts on production by him of the vouchers so furnished to him by the sheriff. In making up the sheriff’s charge for mileage it was admitted that he charged for each juror the distance from the court house to his residence, and by the road which the officer would have to travel. Further, it was admitted that the sheriff charged 20s. for returning the panel of jurors for the sessions, and 20s. for the panel of the same jurors to serve in the county court.

These charges had been paid without any fault being found, or the corporation making any enquiry into the matter, until the end of 1857 or beginning of 1858. It seemed that the warden of the county at that time received a communication from the county of Grey on the subject of the sheriff’s accounts, and upon applying to the sheriff to know the principle upon which the mileage for serving jurors was charged, he learned what has been already stated. Then, upon comparing the accounts with each other, which had been from time to time rendered, it was found that the mileage charged varied very greatly, sometimes being as much as 1530 miles for summoning the jury for one court.

The council of the county appointed a committee upon the subject, and the committee thought the sheriff should charge the services for mileage thus, viz., that after having ascertained the number of persons to be summoned from any one township, the officer should first proceed to the place of residence of the nearest person, and serve him, and then proceed to the next, and so on, and then that the number of miles actually travelled in making such a round of services should be charged, and not mileage to each juror's house from the court house. The committee further thought the sheriff was only entitled to one 20s. for return of the panel of jurors to the sessions and county court, inasmuch as they were the same jurors.

The corporation thereupon resolved to bring an action against the defendant to recover back the money, and that they would give evidence to show that the sheriff could not have travelled the number of miles charged in the accounts and thus compel him to give evidence to support his accounts or to adopt the mode they contended should have been followed in making the services for mileage.

Evidence was only gone into so far as to ascertain the principle upon which the sheriff had charged and been paid, and upon which the corporation contended the charges should be made, with a view of having the legal questions settled by the court.

It was admitted with regard to the charges of 20s. for each panel of jurors, that in practice the judge of the county court issued his precept for the jury for the county court, and that the justices issued their precept for the sessions, and that in fact the sheriff did make a double return of the same jurors, one to each court with the precept of that court.

The defendant's counsel raised the following objections.

1. That the action would not lie. That the facts would establish that the payments were voluntary, the account being audited annually by the auditors appointed by the council: that the payments had been made under the act of parliament on vouchers mentioned in the act, which sufficiently authorised it; and besides, the sheriff having paid the bailiffs and officers for serving, on the affidavits which

also entitled him to receive payment, it would be unjust to compel him now to refund.

2. That in an action for money had and received, there should be a demand of some specific sum, or of some thing which was capable of being ascertained, and that it would not apply to a case of this kind.

A verdict was taken for the plaintiffs in order to obtain the opinion of the court whether the action could be maintained, and also to settle the principle, if it could be maintained, upon which the sheriff had a right to make the charges. If the sheriff should be found liable to refund any portion of the money he had received, then the matter was to be referred to the judge of the county court to ascertain the amount.

Adam Wilson, Q. C., and *Freeman*, Q. C., for the plaintiffs, cited 13 & 14 Vic., ch. 55, secs. 61, 81; 16 Vic., ch. 120, sec. 9, sub-sec. 2; *Riddell v. Bank of Upper Canada*, 18 U. C. R., 139; *Smith v. Sleaf*, 12 M. & W. 585, 588; *Butler v. Harrison*, Cowp. 565; *Cox v. Prentice*, 3 M. & S. 344; *Peto v. Blades*, 5 Taunt. 657; *Edwards v. Hodding*, ib. 815; *Brind v. Hampshire*, 1 M. & W. 365, 372; *Skyring v. Greenwood*, 4 B. & C. 281; *Traherne v. Gardner*, 5 E. & B. 913; *Regina v. Treasury Commissioners*, 16 Q. B. 357; *Smith v. Jones*, 6 Jur. 283; *Lewis v. Campbell*, 8 C. B. 545; *Rivers v. Roe*, 4 C. P. 21; *Chitty on Contracts*, 548; *Bilbie v. Lumley*, 2 East 469; *Usher v. Walters*, 4 Q. B. 533; *Steele v. Williams*, 8 Ex. 625; *Ashmole v. Wainwright*, 2 Q. B. 837; *Parker v. Bristol and Exeter R. W. Co.*, 6 Ex. 702; *Tomlinson v. Shynn*, 2 B. & B. 77; *Dew v. Parsons*, 2 B. & Al. 562.

Eccles, Q. C., and *J. R. Martin*, contra, cited *Litt v. Martindale*, 36 Eng. Rep. 424; *Glynn v. Thomas*, 11 Ex. 879; *Valpy v. Manley*, 1 C. B. 602; *Fulham v. Down*, 6 Esp. 26, note; *Wilson v. Ray*, 10 A. & E. 89; *Haigh v. Jones*, 5 M. & Gr. 638; *Andrew v. Hancock*, 1 B. & B. 45; *Colwell v. Peden*, 3 Watts 327; *Smith v. Mercer*, 6 Taunt. 76; *Perry v. Newcastle Mutual Ins. Co.*, 8 U. C. R. 366; *Gill v. Cubitt*, 3 B. & C. 466.

ROBINSON, C. J.—At present I think that the sheriff was entitled to charge for making out the two panels of jurors summoned by him; that is, the one for the county court, and the other for the quarter sessions, supposing that he did actually furnish one for each. The statutes 13 & 14 Vic., ch. 55, sec. 81, 14 & 15 Vic., ch. 65, and 16 Vic., ch. 120, sec. 9, all expressly allow him to charge for a panel for each court, and there is no question about the quantum of this charge, though it has been different at different times under several acts, varying between 20s. and 25s.

The legislature might have made one panel do for both courts, but they have not made that provision, but on the contrary have allowed one to be furnished for each. The chairman of the quarter sessions and the judge of the county court being in general the same person, one panel might suffice for the two courts, so far as that consideration applies; but the offices of the two courts are different, and in order to make the panels conveniently accessible to suitors, it probably is expedient that there should be one in the office of each court.

With respect to the other charge which it is alleged has been wrongfully made—that is, the charge for mileage from the court house to the place of residence of each juror for serving the summons upon each juror—I am of opinion that that mode of charging is not authorised by any of the statutes from 13 & 14 Vic., ch. 55, to the statute which now regulates the charge.

The first statute, 13 & 14 Vic., ch. 55, sec. 81, gives to the sheriff 6d. for every mile that he or his bailiff *may necessarily have to travel* from the county town, for the purpose of summoning such jurors.

This 81st clause, as amended by the 14 & 15 Vic., ch. 65, schedule No. 22, makes the 6d. payable for every mile that the sheriff, &c., may necessarily and actually have had to travel from the county court house for the purpose of serving such summonses.

The only alteration is in adding the word actually to the word necessarily, which denotes an intention to confine the charge to the number of miles really travelled, though the

introducing the word *actually* in addition does not, I think, make the intention more apparent than it was before.

The statute 16 Vic., ch. 120, sec. 9, retains the exact words of the provision as it had been thus amended; and the "Upper Canada Jurors' Act of 1858," 22 Vic., ch. 100, if in point of time it had been applicable to the present case, would have made no change as regards the fee in question.

It only shews (sec. 161) that the legislature had become aware of the necessity of providing a new check in regard to this fee, for it provides for a more particular affidavit in regard to the number of miles travelled, and that the sheriff's account shall be subject to audit, and an order made by the court of quarter sessions directing the payment, so that the charge made for summoning each juror must now be specified, and the accounts must pass under the inspection of the court of quarter sessions and of auditors, before the treasurer is to pay them.

Of course it may be argued that the making this new provision shews that the mode of charging had been different under the former act, and that the legislature were putting the matter on a new footing. No doubt there is something new as regards the more particular form of affidavit and the auditing the order of the sessions for payment, but as to the mode of charging mileage I do not think the present act makes any change. That was already very plain under the former statutes, and was not altered, I think, by the new act.

All that any of the statutes had given was 6d. a mile for the distance necessarily travelled from the county town to make all the services. It was never allowed, I think, to charge from the county town to the residence of each juror, as if the sheriff had made a new start from the county town to go to the residence of each person, though eight or ten jurors might be living near each other in a township thirty miles from the court.

Then the other point submitted to us is whether, admitting this charge to have been excessive, the plaintiffs can now maintain this action to recover it back.

The case of *Dew v. Parsons*, (2 B. & Al. 562,) fully sup-

ports this action in principle. The same case is reported in 1 Chitty's Reports, 295. The sheriff would have had no right to make any charge for the summoning jurors unless a fee had been assigned to him by the legislature. Many cases lay down that principle clearly, and it is certain he could have had no legal claim to be paid out of the county revenue for a service of this kind, if there had not been a statute directing that the county should bear the charge. This being so, he must restrict himself to what the statute does allow, because for any excess above that he has no authority. I find nothing to narrow the application of the principle acted upon in *Dew v. Parsons*, and which does not seem to be interfered with by the case of *Skyring v. Greenwood*, (4 B. & C. 281,) or any case of that kind.

The sheriff is a public officer, held responsible for what his deputies and bailiffs do in the execution of duties belonging to his office, and I find no authority for holding that because the fee improperly exacted may have gone into the hands of his bailiff, or because it may have been long ago expended, either by him or by the sheriff, it can, therefore, not be reclaimed. An individual in such a case could sue for the money back, and as the money in this case came from the public funds of the corporation, I think no reason exists why the corporation may not recover it. It is a strong circumstance that under the laws in force when the fees in question were received the treasurer was legally bound to pay the sum which appeared to be due on the sheriff's account for the service, supported by the affidavits required. He had therefore a right to suppose that the service was charged for in conformity to the law. If any mistake was committed it was by the sheriff or his officers, not by the plaintiffs or the treasurer; but if the charge had been passed by a mistake of the treasurer, I do not see that that would prevent its being reclaimed.

In *Dew v. Parsons* the court thought nothing wrong had been intended, and that it was not very reasonable that the charge had been objected to, (as appears in Chitty's report of the case,) but yet they allowed the money.

I refer on the point I am now considering to *Bize v.*

Dickason, (1 T. R. 287,) Jons v. Perchard, (2 Esp. Ca. 507,) Longdill v. Jones, (1 Stark N. P. C. 276,) Graham v. Gill, (2 M. & Sel. 297,) Harvey v. Archbold, (3 B. & C. 626,) and Steele v. Williams, (8 Ex. 625.)

There does seem to be in this case a practical difficulty in the way of arriving at the exact amount which should be regarded as being in excess of the legal charge. It cannot be said that it is shewn on the face of this case what exact amount can be properly reclaimed, because that depends on the distance actually and necessarily travelled in serving all the jurors in each panel; but whatever difficulty that might have created if the case had gone to trial, the parties have acted reasonably and considerately in obviating it by agreeing to a reference for determining the amount in case, from the effect of our decision, that should become necessary.—See *Parker v. The Bristol and Exeter R. W. Co.*, (6 Ex. 706.)

Upon the main question in the case, what I take to be the law in regard to suing for the money back, is strongly expressed by Baron Martin, in *Steele v. Williams*, (8 Ex. 632,) where he says, “It is the duty of a person to whom an act of parliament gives fees to receive what is allowed, and nothing more.” “This,” he adds, “is more like the case of money paid without consideration—to call it a voluntary payment is an abuse of language.” The question there was about an excess of fees charged by a parish clerk for searches and certificates.

And further, there is this to be considered in the present case, that it is hardly to be said that the plaintiffs paid the money with a knowledge of all the facts, if that would be conclusive alone, for they paid it upon accounts and vouchers furnished by the sheriff to the effect that the charges were made upon the miles travelled, which would be in conformity with the act of parliament, the terms of which required them to pay upon such accounts and vouchers being produced to them. When they found that the sheriff was mistaken in his construction of the act, and that services were charged, and had in consequence been paid for, on an erroneous understanding of the law by the officer, it appears to me that the plaintiffs must be in a situation to reclaim. If the sheriff

had charged 1s. a mile instead of 6d., and the plaintiffs had paid it, then, whether they could have recovered it back or not, this at least is clear, that the payment would have been made with a knowledge of the fact, but I think here it is otherwise.

McLEAN, J.—As to the first point, whether this action will lie under the circumstances to recover money back.

The principle, as stated by *Lord Mansfield* in the case of *Bize v. Dickason et al.*, (1 T. R. 287,) is that which seems to govern all the cases for money had and received to the plaintiffs' use. In that case there had been dealings between the plaintiffs and the bankrupt, of whose estate the defendants were the assignees. The plaintiff paid to the defendants a sum of money claimed by them, without deducting a considerable sum for which he was entitled to credit from the bankrupt's estate. After discovering the mistake he demanded the amount to be repaid to him, and that being refused he brought an action to recover back the amount as so much money had and received by the defendants to his use, and he succeeded in his action. *Lord Mansfield* stated the law to be that when a person pays money which he should in good conscience pay he cannot recover it back; but where money is paid *by mistake*, which there was no ground to claim in conscience, the party may recover it back again by this kind of action. Was this money, then, which the plaintiffs claim, paid to the defendant by mistake, when there was no ground in conscience on his part to claim or receive it? There seems to be no reason to believe that the county council during the time the fees complained of were charged and received by the defendant were aware how the charges were made up, or that they knew any thing except the gross amount paid from time to time for the services in summoning jurors. The payments were made by the treasurer without the accounts being submitted to the council, and the treasurer seems to have considered himself bound to pay whatever sums the several accounts amounted to when sworn to by the sheriff's officers. There is no reason to doubt that the affidavits were correct according to the manner of com-

puting the number of miles travelled as adopted by the sheriff and his officers, and it must be assumed that they considered that the correct mode ; but if not sanctioned by law, then it is perfectly clear that by such mode the defendant has received a considerable amount beyond what he was entitled to for the service rendered. That amount being paid by the plaintiffs in ignorance of the true state of the case, or under a belief that the amount charged was the proper amount which should be paid, they now desire to have refunded into the county treasury from which it was paid by mistake, and I think they may maintain this action for the purpose of enforcing the re-payment.

The case of Dew, sheriff, v. Parsons (2 B. & Al. 562) is one so decidedly in point that I cannot draw any distinction in principle. In that case the plaintiff claimed as a matter of right from the defendant a larger amount of fees upon several warrants issued by him than he was by law entitled to, and the defendant, an attorney, paid it in ignorance of the law. Subsequently the plaintiff brought an action against the defendant, apparently to establish a right to other fees claimed, and the defendant set off in that action the amount previously illegally exacted. At the trial the plaintiff objected that the payment had been made with a full knowledge of all the facts, though under a misapprehension as to his legal liability by the defendant, and therefore that it could not be recovered back, and consequently was not the subject of set-off. The learned judge, however, admitted the evidence, and the balance of the account being then against the plaintiff, he was nonsuited. A rule was obtained the following term for setting aside the nonsuit, but the court held that the defendant might maintain money had and received for the excess paid beyond the legal fees, or might set off the same in the action of the sheriff against him. The same principle is supported and acted upon in the cases of Bize v. Dickason et al., to which I have already referred, Cox et al. v. Prentice, (3 M. & S. 344,) Traherne et al. v. Gardner et al., (5 E. & B. 913,) and various other cases ; and I think all the authorities shew that where money is paid by mistake, or in ignorance of legal charges, or

under protest, the excess may be recovered back in an action for money had and received. Under this view of the law, and not considering the payments made to the defendant as voluntary payments made with a full knowledge of all the facts, I think the defendant is liable to refund whatever amount he has received beyond what he was by law entitled to receive.

Then as to the charges which a sheriff is entitled to make for summoning juries for the several courts. I think that the law did not at any time authorise a sheriff to charge as if he or his officer travelled the actual distance between the court house and the place of residence of each juror in order to serve a summons. The utmost that could be properly charged was the number of miles actually travelled from the county town in serving the jurors with the summonses for their attendance. While the sheriffs were paid a gross sum for summoning each jury, of course no question could arise as to the actual number of miles travelled, but when the present system of selecting and balloting jurors was adopted, and the travelling, instead of being confined to one neighbourhood, as it generally was under the old system, was extended to every township, and not unfrequently to the most distant parts of counties, it became necessary to change the mode of remuneration to the sheriffs or officers whose duty it was to summon jurors, and then an allowance was made for each mile travelled and for the service of each summons. The mileage could only be ascertained by the oath of the person serving a summons; but when two or three or more resided in one neighbourhood, or on the same line of road, and there was in fact but one journey performed to summon them all, it never was contemplated that mileage should be charged as if the officer travelled from the court house to serve each individual. The distance actually travelled to serve the whole appears to me all that could properly be charged in such cases.

As to the panels of jurors furnished by the sheriff for the courts of general quarter sessions and county courts, I think he is entitled to the same charge for each panel. A separate precept is issued from each court, and each court has

its own clerk, in whose hands its records and papers must be kept. The judge of the county court is now *ex officio* chairman of the quarter sessions, and if either court were obliged to depend upon the clerk of the other for the panel of jurors, great inconvenience might sometimes arise. The same jurors serve in each court, but that does not render it less necessary that each court should have a panel of their names to be used when required.

BURNS, J.—*First*, with respect to the claim the plaintiffs make against the defendant to be refunded the 20s. for one of the panels returned by the sheriff to the sessions and to the county court, I think the sheriff is right. The plaintiffs rely upon the proviso to the 30th section of the jury act, 13 & 14 Vic., ch. 55, which enacts that it shall be lawful for the sheriff to return the same panels to the precepts for the sessions and for the county court, where the day for holding the respective courts shall be the same, to establish that he should be paid only one 20s. for the return of the panels. It is admitted, and the practice is, that two precepts are required, one from the judge of the county court, and one from the justices in sessions. It is also admitted that in practice the sheriff makes a return to each court of a panel of jurors with his return to the precept. The practice is correct, for each court acts independent of the other, and each may fine jurors for non-attendance and otherwise, and it might be both inconvenient, irregular, and illegal to impose such fines upon persons who did not appear returned to serve as jurors in the court imposing the fines. The 81st section enacts that the sheriff shall be entitled to the sum of one pound for each panel of jurors returned and summoned by him in obedience to any general precept. Now, when the sheriff has two precepts upon which he summons the same persons to attend two courts, and returns the names in two separate panels to the two courts, I do not see it can admit of any question but that it is in fact a panel of jurors to each court, and therefore two panels. That the persons are the same in both cannot make them one panel, where they appear in different places, and under different

authority, and I think it cannot admit of any other argument than that they must be considered as each of them to be a panel returned.

Secondly, as respects the other portion of the plaintiff's demand, which would probably amount to some £500 or £600 in all, this requires to be dealt with upon other grounds. The charge allowed the sheriff for mileage in service upon jurors is thus expressed in the 81st section of the same jury act, "*a further sum of sixpence for every mile that he, or his deputy, or bailiffs, may necessarily have to travel from the county town for the purpose of summoning the jurors upon such panel.*" The construction put upon this by the defendant ever since 1851, when the county was first set apart, has been that he had a right to charge mileage for each juror from the court house to his place of residence, and that at certain seasons of the year when freshets prevented the bailiffs from taking the direct road to the juror's house, and when bridges were carried away on the Grand River, the distance to get to the juror's place would in some cases be doubled and trebled, and these circumstances accounted for the unequal number of miles travelled for the different courts. I am not prepared to say that the defendant's construction is the proper one to give the act, to the full extent he contends for; but, on the other hand, I feel quite clear the construction which the plaintiffs desire to put upon it cannot be correct. According to their mode of making the allowance for travel, they have not taken into account accidents which may happen to bridges, roads, &c., and have not considered that the bailiff may not be able to effect the service according to law upon going a first time to the juror's place of residence, and may have to return again. The defendant claimed payment according to his construction of the act as a matter of right, and it has been paid to him since 1851, up to the commencement of 1858, without any question having been made upon the subject.

The mode provided by the act for the payment of these charges is that the same was to be paid by the treasurer out of any moneys in his hands belonging to the county not specially appropriated by act of parliament, upon proof of

affidavit made before some commissioner, of such travel having been so necessarily performed in the making such service; and for such money so paid the treasurer should be allowed in his accounts with the county, as if the same had been paid under the special authority and direction of the corporation. The legislature has not provided for any examination of or audit of these accounts before being paid, but has made them payable simply upon certain affidavits being produced to the treasurer. In this way the legislature has certainly left the matter very open indeed, and I cannot doubt for a moment that if the treasurer had taken upon himself to refuse payment of any of the accounts so furnished to him, the court, upon being applied to for a mandamus upon the materials laid before the treasurer, would have considered there was a *prima facie* case for ordering payment.

The last jury act has made an alteration with respect to the mileage, and placed it upon the footing not of what the sheriff may *necessarily have to travel*, but what may have necessarily and *actually been travelled* for serving the summonses, and that too only in going to serve, and not for returning. This shews that the legislature has endeavoured to limit the former act, and proves that it must have been considered there was some question which was open to be treated in various ways by the sheriff.

Looking at the case, then, as one in which the defendant may have thought he was quite right in his construction, and did demand payment of his accounts as of right for a number of years, and the same has been paid without question upon the subject, the question is, whether under these circumstances the corporation can recover any portion of the money so paid back again from the defendant, after finding out that the defendant's construction of the act is not perhaps the right construction. I am of opinion that they cannot do so. The positions laid down in the two cases of *Brisbane v. Dacres*, (5 Taunt. 143,) and *Skyring v. Greenwood*, (4 B. & C. 281,) must, I think, govern this one. The defendant has for a series of years been receiving fees which he had some colour of right, from being paid so long without question, to consider his own, and in all probability must have

paid from the money so received to others for the same charges a proportion of it, so that great injustice might be done to hold him liable to refund it now, and to do that upon the construction of an expression with regard to the charge of mileage, by which it may have been thought doubtful what was meant. I am not aware in what manner the sheriff was allowed to charge for summoning juries before 1845, for I find no statute upon the subject. The statute 8 Vic., ch. 38, authorised the justices of the peace in the different districts to frame a table of fees for all services rendered in the administration of justice, and to transmit them to the clerk of the crown in Toronto, to be laid before the judges of the Queen's Bench, and thereupon the judges were to frame a table of fees to guide and govern all officers. The tariff of fees made by the judges under this authority, on the 15th of November, 1845, authorised the sheriff to charge for summoning the whole of the grand jury for the assizes or sessions, £3; and for summoning each petit jury for those courts, £6. In 1851 the legislature departed from the system of allowing a gross sum for the duty, and authorised mileage to be charged in the manner already mentioned. In the last Jury Act, the legislature has reduced the charge from 6d. per mile to 8 cents, and made the other alteration I have already noticed. This gives countenance to the argument in the defendant's favour, that the expression in the act of 1851, *may necessarily have to travel*, might be interpreted to mean the distance from the court house to the juror's residence, for no one could certainly say that the bailiff might not have to go to the juror's place of residence in order to effect that one single service, without doing any other duty.

There are two cases which bear more strongly in the plaintiff's favour than any other I have met with, but, I think, upon examination of the facts of those cases, there is an obvious distinction between them and this case. The first is *Dew v. Parsons*, (2 B. & Al. 562,) which was an action by a sheriff to recover a fee from an attorney, which the sheriff contended he had a right to charge. The attorney did not dispute the sheriff's right to a certain amount, and as to that he claimed a right to set off a previous payment, which he

contended the sheriff had illegally exacted, and consequently was so much money in the sheriff's hands held for the attorney's use. The court upheld the position the attorney took in the matter, and decided the case upon this ground, namely, that the statute 23 Hen. VI., ch. 9, mentioned a *specific fee* which the sheriff had a right to take, and if the sheriff did not bring himself within the act of parliament, he had no right to exact a fee at all, for at common law the sheriff was bound to execute all the King's writs without charge to the parties. The next case is that of *Steele v. Williams*, (8 Ex. 625,) and there the parish clerk had charged for extracts from and searches made in the registry, whereas the court held that since the statute 6 & 7 Wm. IV., ch. 86, sec. 35, the clerk had a right only to charge for a search and a certified copy. The fees were paid under protest, and an action brought to recover the money back, and the court affirmed the principle that no other fee could be taken than such as prescribed by the act. *Martin, B.*, says: "If a person is authorised to receive money by virtue of an act of parliament, it is like a contract between the parties, that the sum allowed shall be *all* which he is to receive, and he is as much bound by the entirety of what he is authorised to take, as he would be by the entirety of a sum in a contract."

This last case establishes one point in the plaintiff's favour, that is, so far as the opinions of Barons *Platt* and *Martin* affect it, and with which I quite agree, as applied to this case; and that is, the defendant being the sheriff, and the fees being paid to him as such under a demand apparently right upon the face of the papers furnished to the treasurer, the payment cannot be looked upon as a voluntary payment by the plaintiffs, but must be considered a payment made to defendant *colore officii*, and when made in that way the principles governing the cases of voluntary payments do not apply, and therefore when so made an action will lie, if the fees received be illegal, to recover the money back.

The point, however, which distinguishes these cases from the one before us, is that here there is no specific fee fixed by act of parliament. It is true the legislature has said the sum per mile for travel shall be six pence, but the legisla-

ture could not define the number of miles which should be travelled, nor could they possibly tell how many might be necessary to be travelled in order to summon the jury. I am not disposed, as I have said, to think the defendant was altogether right in the mode by which he computed it, and yet I find it difficult to say that he might not be within the strict letter of the law, though not the spirit of what was intended. On the other hand, I think what the plaintiffs are contending for cannot be supported. A just measure of computation may lie somewhere between them. Then, if that be so, I do not find the legislature has defined the amount which shall be paid, so that we can say, in an action to recover back the money, it is incumbent upon the defendant to shew by any thing the legislature has said a legal title to retain the money. He could not do so without going into evidence to ascertain it, and that is the very thing I do not think he is called on to do, after the payments have been made for so many years, without the same having been disputed. Admitting that the defendant has acted upon a misconception of what the statute authorised him to receive, yet the plaintiffs have never questioned it, until they got a new light after the passing of the last jury act. Under these circumstances, I do not think the plaintiffs are in a position to compel the court to construe an act of parliament which is repealed in such a way that it will throw the burthen of proof upon the defendant.

I therefore think the *postea* should go to the defendant.

Judgment for plaintiffs, *Burns, J.*, dissenting.

BURRITT V. JONES.

Legislative Council—Contested election—Action by commissioner for fees.

The 20 Vic., ch. 23, does not extend to elections for the Legislative Council.

Where a county court judge, assuming that it did so extend, acted at defendant's request as commissioner for taking evidence in a contested election for that body: *Held*, that he could recover nothing for his services.

This was an action brought by the Judge of the County Court of the county of Perth against the defendant, who was

a candidate at the last election held for the electoral division of Tecumseth for a member to represent that division in the Legislative Council of the province, to recover the fees which the plaintiff contended he was entitled to be paid by the defendant for taking evidence upon a contest between the defendant and the person elected.

The declaration was for money payable by defendant to the plaintiff for fees, wages, remuneration and emoluments, as commissioner in the matter of the controverted election of the Hon. Donald McDonald, the person proclaimed or returned as being elected a member of the Legislative Council, and for services rendered by the plaintiff as such commissioner, and for the time during which he was necessarily engaged on the said commission or enquiry, and in taking the evidence on the matter of fact mentioned in the defendant's notice, and on the matters of fact mentioned in the answer of the said McDonald, the member elect, and at the defendant's request, and for the travelling expenses of the plaintiff on the commission or enquiry at the defendant's request.

There was a second count for work done and materials found, and on an account stated.

Plea.—Never indebted.

At the trial, at Stratford, before *Burns, J.*, no one appeared on the defendant's behalf, and the plaintiff put in the notice which defendant gave the judge requiring him to take evidence upon the facts of his petition to unseat his opponent. The plaintiff called a witness to prove the number of days he was engaged in taking evidence, and what it would be worth. He contended that if it should be decided that the provisions with respect to controverted elections of members of the House of Assembly did not apply to the elections for the Legislative Council, so as to constitute him a commissioner for taking evidence, yet that he was entitled to be paid as for work and labour performed at the defendant's request.

A verdict was taken for the plaintiff, and leave reserved to the defendant to move the court to set it aside and enter a nonsuit.

Hector Cameron obtained a rule *nisi* accordingly, or for a new trial.

C. Robinson shewed cause, and cited *Hooker v. Gurnett*, 16 U. C. R. 180; *Burritt v. Hamilton*, 17 U. C. R. 443; *S. C.*, In appeal, 18 U. C. R. 461.

The statutes bearing upon the question are referred to in the judgment of the court, delivered by

ROBINSON, C. J.—The statutes which are to be considered in determining the question raised are 14 & 15 Vic., ch. 1, sec. 130; 19 & 20 Vic., ch. 140, sec. 13, and 20 Vic., ch. 23, especially secs. 1, 4, and 6.

We think the 20 Vic., ch. 23, under which the county court judge in this case considered he had a right to act, does clearly not in terms extend to elections of members to serve in the Legislative Council, but is applicable only to cases of contested elections pending in the Legislative Assembly. And being a subsequent act to the 19 & 20 Vic., ch. 140, the 13th section of that earlier act cannot be taken to have reached forward to the provisions contained in it, so as to make them applicable to elections to the Legislative Council.

The legislature, it is true, might have used such language in the statute 19 & 20 Vic., ch. 140, as to shew that they intended that whatever acts might be afterwards passed relative to contested elections to the assembly should in analogous cases be applicable also to contested elections to the Legislative Council, but they have not used such language, and it is so unlikely that they would intend an enactment to have that effect, that we should not be justified in so construing the act unless that construction were inevitable, and especially when it is shewn that the Legislative Council have held the 20 Vic., ch. 23, not to extend to that branch of the legislature.

Then, taking this to be so, we think the plaintiff's action for fees or compensation for taking evidence under a void authority cannot be supported. It is true it was hard that the defendant, who required the service from him, should not be bound to remunerate him for a service rendered at his request, and no doubt in accordance with what the learned judge took to be his duty under the statute. But we take

it to be clear that if the 20 Vic., ch. 23, applies only with reference to elections to the Assembly, as we think it does, then the sixth clause of that statute shews that he was not acting under a valid power to do the duty which he did in assumed connexion with the administration of justice, and that the statute gives him therefore no claim to be remunerated as a commissioner, in which capacity he claims to have acted.

The plaintiff was then a king's officer as judge of the county court, acting in a matter which concerned the administration of justice, and the Statute of Westminster 1st ch. 25, affirming what had been before a principle of the common law, disables him from taking any thing more for doing his office than is allowed by authority of parliament.

We think the rule must be made absolute.

Rule absolute.

IN RE LAWRENCE JOICE, CONVICTED BY ROBERT ANGLIN, ESQUIRE, A JUSTICE OF THE PEACE FOR THE COUNTIES OF FRONTENAC, LENNOX AND ADDINGTON.

Master and servant—Conviction—Application to quash nunc pro tunc—Limitation of action where conviction quashed.

The Master and Servant Act, 10 & 11 Vic., ch. 23, does not apply to the case of school trustees and school teacher. Where a trustee, therefore, had been convicted under it as a master, the conviction was quashed.

Owing to a mistake in the Crown Office, a rule to return the writ of *certiorari*, and afterwards a rule for an attachment, issued, although a return had in fact been filed. More than six months having thus expired since the conviction, the court were asked to allow process to issue against the justice for the illegal conviction as of a previous term, but the application was refused.

Quære, whether the six months could be held to run only from the time of quashing the conviction.

Harrison, in Michaelmas Term, obtained a rule *nisi* calling on the justice to shew cause why the conviction should not be quashed as of Hilary Term last, on the ground that the said justice had no jurisdiction over the subject matter of the complaint, and the conviction was in other respects illegal and unlawful; and why the said Joice should not be allowed to issue process, and commence an action against the said justice in respect of the said conviction and the proceed-

ings thereon, as of Hilary Term, or as of such other time as the court might direct, and why the said justice should not pay the costs of issuing the writ of *certiorari*, and the application for a writ of attachment, and of this application.

It appeared that Joice was one of the trustees of a school section in the township of Pittsburg, for the year 1857, and that he, with the other trustees, acting in their corporate capacity, in February, 1857, engaged a school teacher, by a contract in writing, to teach in the section for ten months, which expired in January, 1858. Some dispute arose between the teacher and the trustees in regard to the teacher's salary, and upon a complaint made by the teacher to Mr. Anglin, as a magistrate the case was treated as one coming under the Master and Servant act, 10 & 11 Vic., ch. 23, and a conviction made of Joice as a master.

The conviction had been removed into this court, and it was sworn that while the proceeding upon the *certiorari* was pending the justice had issued his warrant, and caused some of Joice's cattle to be seized and sold.

When the writ of *certiorari* was issued and served upon Mr. Anglin, he immediately made a return of the conviction under the advice and instruction of counsel, and the writ and return was without delay sent to the clerk of the court, Mr. Small, and filed in his office. Mr. Joice's attorney searched there, and being informed by mistake that it had not been returned, a rule to return the writ of *certiorari* was taken out.

This rule was served in May or June last, and in consequence of it Mr. Anglin's attorney, on the fifth of June, called at the office of Messrs. Paterson & Harrison, who had taken out the writ, and told them that it had been returned, and found the writ in the Crown Office.

Hearing afterwards that a rule for attachment had issued for not returning the writ, the attorney, Mr. Kirkpatrick, instructed his agent in Toronto to move to have the same rescinded, but it seemed it was understood between his agent and Messrs. Paterson and Harrison, that the attachment should not be acted upon.

Prince shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The conviction is clearly illegal, and must be quashed, and the rule so far is to be made absolute. It was clearly no case under the statute 10 & 11 Vic., ch. 23, and the justice who convicted misapplied the statute.

But as to that part of the rule which asks that Mr. Joice should be allowed to issue process in the action against the justice on account of the illegal conviction as of Hilary Term last, or of any day other than the true time of suing out the writ, we should by that be depriving the justice of a protection which an act of parliament gives him, and we should be so far indirectly repealing the act. The seventh section of 16 Vic., ch. 180, provides that the six months within which the action must be brought are to reckon from the day on which the act was committed: in other words, from the time of the wrong done by the justice. At least, so we construe the act. If in consequence of the enactment in the second section of the act, which makes it necessary to have the conviction quashed before an action can be brought, the party is advised that the six months can be legally computed from the time of setting aside the conviction, he can proceed at the peril, perhaps, of having an application made to set aside the proceedings under the sixth clause of the act, or at any rate of having the lateness of the action urged in a more formal shape.

Conviction quashed.

COOL V. TOBIAS SWITZER AND WILLIAM SWITZER.

Bond given by clerk of Division Court—Right of action by bailiff thereon—13 & 14 Vic., ch. 53.

The bailiff of a division court may sue the sureties for the clerk, upon the bond given under 13 & 14 Vic., ch. 53, for fees on the service of summonses, executions and warrants, received by him for the bailiff and not paid over.

In the declaration in such a case, it is not necessary to specify the names of the parties from whom, or the suits in which, the moneys claimed were received.

Whether the money received was payable before action brought, or whether the clerk was justified in withholding it under the act, is a question of evidence as to each sum.

DECLARATION.—For that the said defendants, the said

Tobias Switzer as clerk of the ninth division court of the county of York, and the said William Switzer as one of his sureties, together with one John Belnap, another surety for said Tobias Switzer, by their writing obligatory, sealed with their seals, and dated the sixth day of January, 1851, executed according to the statute in such case made, did jointly and severally covenant and promise that the said Tobias Switzer, as such clerk, and then being such clerk as aforesaid, should duly pay over to the person or persons entitled to the same all such money as he should receive by virtue of the said office of clerk of said division court, and should well and faithfully do and perform the duties imposed upon him as such clerk by law, and should not misconduct himself in said office to the damage of any person being a party in any legal proceeding. And the said plaintiff avers that during all the time the said defendant Tobias Switzer was and acted as such clerk of said division court, and whilst the said William Switzer was so bound as the surety in said writing obligatory for said Tobias Switzer as aforesaid—to wit, from the making and date thereof until and including the year 1854, until and after the said Tobias Switzer ceased to be clerk of the said division court—he, the said plaintiff, was and acted as the bailiff of said division court duly appointed in pursuance of law, and was entitled to the fees for the services of summonses, executions and warrants, and other fees as bailiff thereof. And the plaintiff, for a breach of the said writing obligatory, further avers, that after the making of the said writing obligatory, and before the commencement of this suit, and whilst the said Tobias Switzer was legally acting as such clerk of said division court in pursuance of law, and during the period of time aforesaid, divers sums of money, charges and poundages, of right due to and chargeable by the said plaintiff for the services of divers summonses, executions, subpoenas, warrants and processes, issued in divers suits instituted and carried on in said division court, were paid to and came into the hands of the said Tobias Switzer, as such clerk, in due course of law, and which he, the said Tobias Switzer, as such clerk ought to have paid and accounted for to the said plaintiff as such bailiff, to wit,

moneys to the amount of £95; and that the said sums of money, fees, charges, and poundages so due to him, the plaintiff, from the defendant Tobias Switzer as such clerk, are wrongfully withheld unpaid and unaccounted for to him, the plaintiff, by the said Tobias Switzer.

The defendant Tobias Switzer allowed judgment to go by default.

The defendant William Switzer demurred to the declaration, alleging as grounds that the plaintiff has no right to sue on the bond declared on for the pretended cause of action in the said declaration set out, as the said bond is only for the benefit of the suitors in the said division court, and was not for the purpose of securing payments by the division court clerk of the fees to the bailiff thereof: that there is no allegation that the moneys in the said declaration mentioned as being received by the said Tobias Switzer, were received by the said Tobias Switzer by virtue of his office as clerk of the said division court; and that the same moneys, with the exception of the fees of the said plaintiff as bailiff upon executions, were not payable by law to the said Tobias Switzer as such clerk of the same division court; and that as to the plaintiff's fees as bailiff upon executions, the same were not payable to him by the clerk until the return of such executions, of which there is no allegation; and that the said declaration is not sufficiently certain, or the breaches assigned sufficiently particular, the moneys alleged to have been received and withheld not being specifically pointed out, so as to enable the defendant to know with what he is charged.

McCarthy, for the demurrer, cited Consol. Stats. U. C., ch. 19, secs. 24, 27, 36, 49, 52; *Commercial Bank v. Jarvis*, 6 O. S. 474.

Durand, contra.

ROBINSON, C. J., delivered the judgment of the court.

We see no sufficient reason why the plaintiff, being a bailiff of a division court, should not be allowed to sue upon the covenant given by the clerk, and under the 22nd section of

13 & 14 Vic., ch. 53, unless perhaps from this consideration—that the clerk may be properly detaining the fees from the bailiff under the 14th section of the act, and yet might be unable to shew the cause of such detention, except by his own evidence, which could not be received. This demurrer, however, is by the surety.

We see nothing in the statute, or in the form of the covenant, which confines the benefit that can be had under it to suitors in the division court.

It would seem that it would have been very convenient if we could have held the 76th section of 13 & 14 Vic., ch. 53, to be applicable to such a case as the present, and that as between themselves the clerk and bailiff should be confined to that remedy for any complaints they may have against each other, but we do not think we can so apply it, and it was not contended on the argument that we could.

We think, if an action for money had and received would lie by the bailiff against the clerk for money which the other had received for him by virtue of his office, in the absence of any such covenant, that we cannot hold otherwise than that the language of this covenant is large enough to extend to the recovery of any such moneys under it against the clerk; and if so, then equally against his sureties.

We do not think that the declaration is insufficient because it does not state the names of the several parties from whom, or specify the suits in which, the moneys were received. That may reasonably be dispensed with on account of the prolixity which we may suppose it would occasion in the record, and there is no hardship on the defendant in not requiring it, for he can demand particulars of the claim.

Whether in each case the money received for the bailiff had become before this action money which the clerk was bound to pay over to him, or whether the clerk was justified in withholding it, as he might be, either for a time or entirely, under some of the provisions of the statute, would be a matter of evidence to be gone into in regard to each charge.

We have had some doubt, we must say, in this case, but our opinion is that the action is maintainable in its present shape, and that the plaintiff is entitled to judgment.

Judgment for plaintiff on demurrer.

THE CORPORATION OF THE TOWNSHIP OF WESTMINSTER v.
FOX ET AL.

Note payable to municipal corporation—Plea of usury.

To an action on a promissory note for £110, dated the 20th of November, 1856, made by defendants, payable twelve months after date, to a municipal corporation, defendants pleaded that the note was given for £100, lent by plaintiffs to defendants for one year at ten per cent interest, and for the interest.

Held, plea bad, being no defence except as to the excess of interest above six per cent.

DECLARATION upon a joint and several promissory note for £110, made by defendants on the 20th of November, 1856, payable to the plaintiffs, at the office of the treasurer of the township of Westminster, twelve months after date; with counts for money lent, for interest, and on account stated.

The defendants, in separate pleas to each count, set up as a defence, that the sum claimed was due for a loan of £100 made by plaintiffs to defendants for twelve months, at the rate of ten per cent. per annum for interest, and for the said interest of one year; and the plaintiffs demurred to these pleas. No exception to the declaration appeared on the demurrer books, but the defendants' counsel urged that the plaintiffs being a municipal corporation could not lend money at interest, and therefore could not recover.

McBride, for the demurrer, cited Consol. Stats. C., ch. 25, sec. 11; Angell on Corporations, 263.

Read, Q. C., contra, cited 22 Vic., ch. 99, sec. 215; Municipality of Kinloss v. Stauffer, 15 U. C. R. 417; Mitchell v. Cockburne, 2 H. Bl. 379; DeBegniss v. Armistead, 10 Bing. 110; Broughton v. The Manchester Waterworks Co., 2 B. & Al. 1; East Anglian R. W. Co. v. Eastern Counties R. W. Co., 11 C. B. 775; Beach v. Fulton Bank, 3 Wend. 583; Inhabitants of Worcester v. Eaton, 11 Mass. 376; North River Insurance Co. v. Lawrence, 3 Wend. 483; Consol. Stats. C., ch. 58.

ROBINSON, C. J., delivered the judgment of the court.

In our opinion the plaintiffs are entitled to judgment on this demurrer. The pleas set up as a defence by way of bar

to the action upon each count that which could only be a defence against the payment of any excess of interest above six per cent. under the statute 16 Vic., ch. 80.

We have no note entered in the demurrer books of any exception intended to be urged against the declaration, and it would be unjust to shew any particular favour to a defence by which a party accepting money from another by way of loan desires to avoid the repayment of it altogether.

And if we were to consent to go into such exceptions as have been urged, still we do not think it likely that they would be found entitled to prevail. For all that appears the note sued on may have been given upon a transaction having nothing to do with banking, or any kind of business that is prohibited, as, for instance, for money over-paid to defendants upon a contract.

Judgment for plaintiffs on demurrer.

CAMPBELL V. BURLEY.

Covenant for title—Sale by sheriff—Effect of sale on such covenants—Action by covenantee after sale of his interest—New trial refused.

Plaintiff sued defendant on a covenant for seisin and right to convey, and defendant pleaded only that he was seised and had good right to convey. It appeared that the plaintiff's interest in the land had been sold by the sheriff to one McGrogan, and that the plaintiff had previously mortgaged it to one McCallum, and the plaintiff's attorney, being called by defendant, swore that this suit was authorised by the plaintiff to be brought in his name for the benefit of McGrogan, and that he, witness, also represented the mortgagee, who was to be paid out of the verdict. The sum paid by McGrogan, with the mortgage money, amounted to nearly the purchase money paid by plaintiff to defendant, with interest, for which the jury gave a verdict. On motion for a new trial, with leave to amend the pleadings, it was objected that the plaintiff could not recover, as the covenant running with the land had passed to McGrogan, and that the damages were excessive; but the court refused to interfere, the verdict being just.

Quære, whether a purchaser at sheriff's sale acquires a right to sue on covenants running with the land.

ACTION on a covenant, setting forth that on the 8th of March, 1848, by an indenture between the plaintiff and defendant, the defendant granted and sold the east and west halves of 7, in the 9th concession of Clarke, and gave a covenant that he was seised, and had a good right to convey. The plaintiff averred that defendant was not then seised, and had no right to convey.

Plea.—That defendant was at the time of making said indenture lawfully seised, &c., as owner in fee simple, and had good right to convey, &c.

At the trial, at Kingston, before *Hagarty*, J., the only evidence given was the putting in the deed sued on. And Mr. Kirkpatrick was called for the defendant. He swore that the plaintiff, Campbell, had authorised him to bring this suit for the benefit of one McGrogan, who had bought the land at sheriff's sale, at his suit against this plaintiff, Campbell, giving for it £25. This was in 1849 or 1850. McGrogan's judgment was for a sum of about £37 10s. He brought ejectment against a person in possession of the land, but failed to recover, because the title of Burley was bad.

The witness stated that the land had never cost McGrogan over £100; that he, witness, also represented a Mrs. McCallum, widow of a mortgagee of this land, under the plaintiff, Campbell, and that this suit was carried on for her benefit also: that the claim was about £50, with eleven years' interest on it, the two claims with interest amounting to nearly the purchase money and interest in the deed between Campbell and Burley. He stated that he had no authority from Campbell to act for Mrs. McCallum, but that he held the mortgage made by Campbell to her husband, and that he had McGrogan's authority to do what was right; and the plaintiff at the trial, in court, stated through his counsel that he would pay Mrs. McCallum if he recovered.

The learned judge told the jury that he thought damages should be given on the principle applied in such cases; that is, the purchase money paid by plaintiff, and interest; and the jury found accordingly, £213. The defendant's counsel contended that the jury should only be directed to give the damage that the plaintiff had actually sustained.

Crooks, obtained a rule on the plaintiff, and on *Thomas Kirkpatrick*, Esquire, his attorney, to shew cause why proceedings should not be stayed, on the ground that the suit had been settled between the plaintiff and defendant, and was now prosecuted against the wishes and instructions of the plaintiff, and contrary to good faith; or why there should

not be a new trial on the law and evidence, and for misdirection; and for leave to defendant to amend his pleadings in such manner as might be necessary to suit the evidence; and for excessive damages; or to reduce the damages to the amount of the purchase money and interest. It was moved also on affidavits. He cited *Proctor v. Gamble*, 16 U. C. R. 110; *Rees v. Strachan et al.*, 14 U. C. R. 53; *Thornton v. Court*, 3 DeG. M. & G. 298; *Kingdon v. Nottle*, 1 M. & S. 351; *Harrold v. Whitaker*, 11 Q. B. 147; *Pargeter v. Harris*, 7 Q. B. 708; *Rawle on Covenants for Title*, 344; *Platt on Covenants*, 305.

Prince shewed cause, and cited *Short v. Kalloway*, 11 A. & E. 28; *Rawle on Covenants for Title*, 370.

ROBINSON, C. J., delivered the judgment of the court.

The right to sue on the covenant for title would pass, we think, with the title, according to English authorities on which we have sometimes acted in this court, although it is true that in this case the covenant was broken when the deed was executed. That would establish that the plaintiff, if his action had been properly resisted, was not the person to sue, although a question might be raised, whether the deed made by the sheriff on an execution against Campbell, which we assume only professed to convey all Campbell's interest, whatever it might be, would make the vendee an assignee within the meaning of the doctrine of such covenants passing with the land.

But the defendant being sued in this action sets up no other defence than by affirming that he was seised of a good title, and had good right to convey.

Every thing else, therefore, is out of sight on this record. He gave no evidence of title, however, and so the plaintiff got a verdict for the purchase money in the deed made to him by the defendant with interest, against which the defendant has moved on affidavits, asking leave to amend his pleadings. It appears from the affidavits, as well as from some evidence given on the trial, that this action was brought in privity with Campbell, in his name, for the benefit of those who have suffered from the want of title, and we think we should not

interpose, merely to defeat the ends of justice, by admitting defences in the exercise of our discretion which would enable this plaintiff, by collusion with this defendant, to prevent compensation being received by the only persons who are really entitled to it.

Rule discharged.

WADE V. THE CORPORATION OF THE TOWN OF BRANTFORD.

Lease by Corporation—Action against them on covenant to renew—Plea, that renewal was forbidden by decree in Chancery.

To an action against a municipal corporation for not renewing a lease pursuant to their covenant contained in it, defendants pleaded that they had no authority to make the lease, as defendant, who was an inhabitant of the town, well knew when he took it, and that before the term expired a decree was obtained against them in Chancery, of which defendant had notice before this action, declaring that the land in question was dedicated for a market square only, and that this lease had been granted without authority, and should not be renewed.

Held, on demurrer, no defence.

This was an action of covenant on a lease, in which the plaintiff demurred to defendants' plea.

M. C. Cameron, for the demurrer, cited *Sjoerds v. Luscombe*, 16 East 201; *Barker v. Hodgson*, 3 M. & S. 267; *Hills v. Sughrue*, 15 M. & W. 261; *Marquis of Bute v. Thompson*, 13 M. & W. 487; *Cooch v. Goodman*, 2 G. & D. 159.

Freeman, Q. C., contra, cited *Watson v. The Master, &c.*, of Hemsworth Hospital, 14 Ves. 332; *Great Western Railway Company v. Preston and Berlin R. W. Co.*, 17 U. C. R. 487; *Grant on Corporations* 64; 10 & 11 Vic., ch. 49.

The pleadings are sufficiently set out in the judgment of the court, delivered by

ROBINSON, C. J.—The statute 10 & 11 Vic., ch. 49, incorporating the town of Brantford, gives to the corporation a common seal, with power to hold and convey lands, and it contains no provision particularly affecting the authority of the corporation to make leases of the ground in question, or of any land belonging to the city. We do not find either that the Municipal Act 12 Vic., ch. 81, passed a short time before

the lease referred to in the pleadings was made, contains any thing that it can be material to consider for the purpose of this case. Then this is a lease made by the corporation to the plaintiff of a small building in the town, to hold for ten years at a yearly rent of £12 1s., with a covenant by the corporation to renew for another term of ten years, at a rent to be settled by arbitration, if requested by the plaintiff six months before the expiration of the term; and the corporation imposed upon the plaintiff a condition to build a house of certain dimensions upon the lot within the first year.

The plaintiff avers that he entered into possession and built a house, and fulfilled all the conditions of the lease, and requested a renewal for a second term of ten years according to the lease, but that the defendants refused to grant it.

There could hardly be a plainer cause of action stated, or one apparently more just. Then the question is whether the plea is a good answer to it.

It states that the mayor had no authority to make the lease: that the plaintiff was at the time an inhabitant of the town of Brantford, and well knew that: that it has been determined in the Court of Chancery, in a suit by information filed by the Attorney-General, in which suit the plaintiff and these defendants and others were defendants, that a certain tract in the town of Brantford, of which the small lot in question in this action is part, was laid out and dedicated (not said when) by Her Majesty as a market square for the said town, and for such purpose only, and *ought to be* kept open, and free from any buildings, except for market purposes, and that they ordered and directed the same accordingly; and did order and declare that this lease, and certain other leases, had been granted without authority, and in contravention of such dedication; and did further order that no renewal of such lease or leases should be granted, and that any buildings on the said lots should be removed at the termination of the respective leases. The plea avers also that this decree remains in full force, and that the plaintiff had notice of it before the commencement of this suit, and has removed his building.

It is quite immaterial, we think, to aver, as is done in the plea, that the *mayor had no authority* to make the lease, for the indenture is sued upon as having been made by the corporation under its seal, and not by the mayor under his private seal; and it is made clear as the plea proceeds, that the defendants do not intend to disclaim the act of the mayor as being one not recognised by the corporation at the time; and the defendants do not deny the allegation that they had received the rent for the ten years.

The defence set up is not that the corporation did not intend to make, and did not make the lease in fact, but that they have learned since, by a judgment in the Court of Chancery, that they did that which they ought not to have done, and had in truth no authority to do. The principle that a person dealing with a corporation must take notice whether the business he is transacting with them is one within the scope of their authority according to their charter, is not applicable in this case, for that is to be understood in a general sense, and has reference to the description of business that the corporation may be engaged in, not to their authority to do a particular act in pursuit of what is clearly within the objects of their incorporation.

This corporation undoubtedly has and had power to make leases of its lands, not being restrained from doing so. This being so, and their charter shewing no incapacity to lease the particular land in question, the plaintiff was at liberty to enter into the contract which he did, and the corporation on their side made the lease at their peril. It is evident that they must have supposed they had the right, and the plaintiff is not to be without redress, and to lose his buildings without recompense for them, because he did not form a better judgment of what it was lawful for them to do than they had formed themselves.

If the land of which the corporation had engaged to renew the lease had never belonged to them, and the true owner had gained possession of it, it would be as clear then as it can be in this case that they had covenanted to do what was beyond their power, but they would have to answer in damages.

It is not shewn that the corporation have been disabled by the act of God, or by any statute, from fulfilling their contract, but merely that it had been determined in a court of equity that they ought not to have taken upon themselves to lease any portion of the market block, and therefore that it was fit they should be restrained from granting further leases, though the terms they had granted it seems were not intended to be interfered with. The plaintiff, in our opinion, is entitled to judgment on the demurrer.

Judgment for plaintiff on demurrer.

CARTWRIGHT V. DETLOR.

Grant—Description of land—Construction.

The Crown in 1804 granted lots 18 and 19 in the 6th concession of Fredericksburgh, containing by admeasurement 247 acres, more or less, and butted and bounded as follows: "commencing in front of the said concession at the S. E. angle of said lot 19; then N. 31° W. *sixty-five chains*; then S. 59° W. 38 chains, more or less, to the allowance for road between lots 18. and 17; then S. 31° E. 65 chains, more or less, to the allowance for road in front of the said sixth concession; then N. 59° E. 38 chains, more or less, to the place of beginning.

Held, to include all of lots 18 and 19, not merely that part extending 65 chains back from the front or south end.

This was an action of ejectment brought by the plaintiff against the defendant for the recovery of fifty acres of lot number 18, and forty acres of lot number 19, in the sixth concession of the township of Fredericksburgh, in the county of Lennox; and by the consent of the parties, and by the order of the Honourable Mr. Chief Justice Draper, dated the 18th day of November, 1859, according to the Common Law Procedure Act, 1856, the following case was stated for the opinion of the court.

CASE.

The plaintiff on the 31st of March, 1857, bought at auction from the Crown Land Department of this province the premises in question, and obtained a receipt for the first instalment of purchase money, subject to the following condition. "The sale is made under the distinct understanding that no claim exists on the part of any person or persons on account of improvements or otherwise: that should such a claim be established this sale shall be cancelled."

The defendant claims the land as comprised in a patent

dated the 8th day of December, 1804, of lots 18 and 19, in the sixth concession of said township, to Mary Ann McNab, Margaret Fraser, and Jane Fraser, and possession held thereunder since the year 1811. The defendant also claims under a patent dated the 3rd day of August, 1799, of lots 18 and 19, in the seventh concession of the same township, and possession held thereunder since the date thereof.

The following are the respective descriptions in the said patents.

The first grants, "all that parcel or tract of land situate in the township of Fredericksburg, in the county of Lennox and Addington, in the Midland district, in our said province, containing by admeasurement 247 acres, be the same more or less, being lots numbers 18 and 19, in the sixth concession of the said township of Fredericksburgh, together with all the woods and waters thereon lying and being, under the reservations, limitations and conditions hereinafter expressed, which said 247 acres of land are butted and bounded, or may be otherwise known as follows: that is to say, commencing in front of the said concession at the south-east angle of the said lot number 19; *then north 31 degrees west 65 chains*; then south 59 degrees west 38 chains, more or less, to the allowance for road between lots numbers 18 and 17; then south 31 degrees east 65 chains, more or less, to the allowance for road in front of the said sixth concession; then north 59 degrees east 38 chains, more or less, to the place of beginning."

The description in the other patent is as follows: "A certain parcel or tract of land situate in the township of Fredericksburgh, containing by admeasurement 334 acres, be the same more or less, being composed of lots numbers 18 and 19 in the 7th concession, and situate, lying and being, in the township of Fredericksburg aforesaid, in the county of Lennox, and Midland District of our province aforesaid, together with all woods and waters thereon lying and being, under the reservations, limitations and conditions hereinafter expressed, which said 334 acres of land are butted and bounded, or may be otherwise known, as follows: that is to say, beginning where a post has been planted on the Appanee river marked $\frac{18}{R}$, below the mills; then south 31 degrees east 78 chains, more or less, to the sixth concession; then north 59 degrees east 38 chains; then north 31 degrees west 98 chains, more or less, to the Appanee River; and then along the edge of the water with the stream, so as to comprehend the said mill, to the place of beginning."

The fifty acres and the forty acres in question form parts

of lots 18 and 19 in the sixth concession of Fredericksburgh, but lie beyond the limit of 65 chains from the front of the concession.

The two lots in the seventh concession are deficient in quantity.

The question for the opinion of the court is, did the aforesaid patent comprise the whole of lots 18 and 19 in the sixth concession, or only the fronts thereof to the depth of 65 chains.

If the court should be of opinion in the negative, judgment shall be entered up for the plaintiff with costs.

If the court should be of opinion in the affirmative, then judgment of *nolle prosequi* shall be entered up for the defendant, with costs of suit.

The following plans are to be referred to :

1. Copy of plan of Fredericksburgh, original made by Thos. Ridout, Esq., Surveyor-General, 21st November, 1825, filed in the office of the clerk of the peace, at Kingston.

2. Plan of survey of G. S. Clapp, D. P. S., made in 1847.

3. Copy of plan of Fredericksburgh, original and additional, made by the Surveyor-General in 1846, filed in the registry office of Lennox and Addington.

4. Plan furnished to the plaintiff by the commissioners of crown lands, 27th of September, 1859. (a)

M. R. Vankoughnet, for the plaintiff, cited *Doe Smith v. Meyers*, 2 O. S. 301; *Doe Manning v. Fergusson*, R. & H. Dig. 148; *Doe Keating v. Wyant*, 6 O. S. 314; *Bac. Abr. Grant*.

Richards, Q. C., for the defendant, cited *Doe Stuart v. Forsyth*, 1 U. C. R. 324; *Doe Campbell v. Crooks*, 9 U. C. R. 639; *Doe Murray v. Smith*, 5 U. C. R. 225.

ROBINSON, C. J., delivered the judgment of the court.

In this case it is stated that the defendant claims under possession held of lots numbers 18 and 19 in the 6th concession since 1811, and of lots 18 and 19 in the 7th concession of Fredericksburgh since 1799. These are the dates of the respective patents for the two lots in the 6th and 7th concessions. It is not admitted, however, in the case that

(a) These plans cannot be given here, and they seem not material to the understanding of the judgment.

such possession has really been held, and as nothing was said about it in the argument we suppose the defendant does not insist upon a title by possession. If such a title were admitted, of course it would make an end of the case, unless indeed the ninety acres in question can be held to be a tract not embraced in the one concession or the other, or rather not included in either of the patents, and of which the fee remained in the Crown till the sale made to the plaintiff by the crown land agent, in March, 1857.

The first patent in point of date is that for lots 18 and 19 in the 7th concession, made in 1799, but not stated in the case to whom.

That patent grants lots 18 and 19 in the 7th concession, and then proceeds to describe those lots in such a manner as to shew that the intention was, as the grant expresses, to grant the entire lots in the 7th concession that were designated by those marks, for the description in express words carries the side lines back from the Napanee river—that is, southerly—to the sixth concession. The length of the western side line of the lots from the sixth concession line is given only as a supposed distance of 78 chains, and that on the east side of the tract is in like manner given as a supposed distance of 98 chains, the difference being owing no doubt to a known deflection of the river towards the south. We must infer from the language of the descriptions that the government were not certain what would be found to be the exact length of either line, whether it was because no precise length had been reported to them as the result of an actual chaining upon the ground, or because they were not confident that any measurement which had been made was perfectly correct.

The patent shews that the government referred to the river at one end of the lots and to the sixth concession line at the other end as the intended limits to the north and south, and that the whole depth of land between those limits was meant to be comprehended in the grant. Accordingly the length of the side lines between those limits was given as an uncertain distance, qualified as usual by the words, *more or less*; and the area of the two lots so described

was also for the same reason expressed with the same qualification: that is, 334 acres more or less.

This elder patent, then, for 18 and 19 in the 7th concession, covered all the land southerly up to the sixth concession, but no more. It did not include any land in the sixth concession.

Then the patent issued in December, 1804, to Mrs. McNab, and to Mary and Jane Fraser, granted to them lots 18 and 19 in the sixth concession, which were described as containing 247 acres more or less.

The description in that patent commences in front of the sixth concession, at the south-east angle of lot 19, and thence runs north 31 degrees west, 65 chains, *an absolute distance*: that is, without any qualification by the words more or less, and without making any reference to the next or seventh concession line. But as we go on with the description, we see clearly that it was not intended, by describing that side-line as of a certain and absolute length, to make the tract stop short of the seventh concession line, if the 65 chains should not extend to it, for after crossing over the two lots to the west side of lot 18 on a course parallel to the concession lines, the western side-line of this tract is expressed to be 65 chains "*more or less*" to the allowance for road *in front of the sixth concession*. This shews very plainly that the lots granted by this patent and by that of 1799 were to but upon each other, leaving only the sixth and seventh concession line between them. The two side-lines mentioned in this description must have been intended and supposed to be of the same length, as they are bounded at each end by lines exactly parallel to each other. There was nothing meant therefore by making the eastern side of the tract an absolute distance of 65 chains. It is the only line of the four which wants the words "*more or less*," and it is clear that the omission was undesigned, and not intended to have any particular effect upon the description, for the latter part of the description shews it to have been framed without attention to the circumstance of the eastern side-line being made an absolute distance. If it had been intended that the eastern side-line should run exactly 65 chains from the sixth

concession, and stop there, then there could have been no sense in adding the words "more or less," to the 65 chains given as the length of the western side-line, because it must have been of the same length as the other, for the reason we have already stated, that they lie between parallel lines at each end.

What was lost sight of in framing this patent, was the propriety of adding to the description of the eastern side-line the words "*more or less*, to the seventh concession line." But that omission is of no consequence, because this patent commences by granting "*lots 18 and 19 in the 6th concession*," containing 247 acres, more or less; that is, in other words, it grants the whole of the two lots, as they stood numbered in that concession, either on the ground or in the government plan of the original survey, whatever may be their contents. The area is assumed to be about 247 acres, because if all the lines were really of the length specified they would enclose that number of acres, but the quantity is given as an uncertain quantity, because the lines were, with one exception, of an uncertain length.

It is admitted that the 90 acres, which the government agent so late as in March, 1857, contracted to sell to the plaintiff, are parts of lots 18 and 19 *in the sixth concession*; and that, in our opinion, decides the point submitted to us in favour of the defendant, for the crown had granted those two lots to Mrs. McNab and her sisters in 1804. There could be no ungranted land, therefore, *in those lots* in 1857—nothing that the Crown could sell or give away. The only room for a question would be as between the proprietors under the first patent of 1799 and those of 1804, and that question would be, what is the true position of the sixth and seventh concession line. The claimants under the patent of 1799 could come to that line and no further, and the claimants under the patent of 1804 could come up to the same line on the other side, but there can be no third tract between the two except the allowance for road, if there is one.

Judgment of *non pros.* must therefore be entered.

Judgment for defendant.

MCMASTER V. ANDREW GEDDES AND JAMES GEDDES.

Crown Lands agent—False representation and collusion in order to obtain increased price on public land—Right of action.

A., a Crown lands agent, being asked by the plaintiff whether there were any lands for sale by government in the township of M., told him that there were not, but that B. had certain lots there to which he would sell his right, and the plaintiff being introduced by A. to B. paid the latter £50 for his good will, together with the first instalment required by government, and received from him a receipt for the latter signed by A. as Crown lands agent. The jury found that the representation that there were no lands for sale was false, and made by A. in concert with B. to enable the latter to obtain an advance upon the government price.

Held, that the £50 and interest might be recovered in an action against A. and B., either upon the special count set out below, charging the false representation, and the damage suffered in consequence by the plaintiff; or as money had and received.

DECLARATION.—First count, for extortion, alleging that on the 1st of September, 1855, and on other days before the commencement of the suit, the plaintiff wishing to purchase government lands in the County of Wellington for the purpose of settling thereon, did on several days since the 1st of September, 1855, inquire of the Crown lands agent for the County of Wellington if there were any government lands in that county open for sale, and did in making such inquiry inform the agent that he wished to purchase from the government a farm to settle on: that Andrew Geddes, one of the defendants, was, on the 1st of September, 1855, and ever since had been, and was at the time of making such inquiry such Crown lands agent for the County of Wellington, and to whom the plaintiff made such inquiry; and although lots Nos. 29 and 31 in the third concession of the Township of Minto, in the said county, each lot containing 100 acres, were government lots unsold at the time the plaintiff made such application to the said Andrew Geddes as Crown lands agent, and were in the hands of the said Geddes as such agent to sell to an actual settler at the price of 7s. 6d. per acre, one tenth of the purchase money to be paid down, and the balance to be paid in nine equal annual instalments, with interest, yet the said defendant Andrew Geddes, being such Crown lands agent, and being well aware that the said lots 29 and 31 were for sale by the government when the plaintiff made such application to

him, and that the said Andrew Geddes had the right and was in duty bound as such agent to sell the said lots to actual settlers at the price of 7s. 6d. per acre on the terms aforesaid, not regarding the duty of his office as such agent, but contriving, in collusion with the defendant James Geddes, wrongfully and unjustly to injure, prejudice, and aggrieve, and to extort money from, the plaintiff on the sale and disposal of the said lots, falsely and fraudulently represented to the plaintiff that there were no government lands in the County of Wellington for sale; that the defendant Andrew Geddes contriving to injure the plaintiff in this behalf, represented to the plaintiff that the defendant James Geddes had lands for sale in the County of Wellington, and shewed the plaintiff into the office of the defendant James Geddes, and the defendant James Geddes, when the plaintiff was so shown into his office by the defendant Andrew Geddes, acting in collusion with Andrew Geddes for the purpose of extorting money from the plaintiff on the sale of the said lots, falsely and fraudulently represented to the plaintiff that the defendant James Geddes was the owner of the said lots 29 and 31, and further falsely and fraudulently represented that he had the right to sell the said lots, and demanded £50 for his, James Geddes', right to said lots. And the defendants James Geddes and Andrew Geddes did then, in collusion with each other, and through and by means of their false and fraudulent representations made to the plaintiff, extort from the plaintiff the sum of £50 for his, the said James Geddes', right so fraudulently in collusion with the other defendant set up to the said lots for the purpose of extorting money from the plaintiff. And the plaintiff in fact saith that the defendant James Geddes never had any right or interest whatever in the said lots, nor had he any power whatever to sell the said lots, and the other defendant Andrew Geddes was well aware at the time that the defendant James Geddes had no right or interest in the said lots, and that the defendant James Geddes had no power to sell the said lots; and that the defendant Andrew Geddes, as such Crown lands agent, would not sell the said lots to the plaintiff till the plaintiff paid the sum of £50 to them, the

defendants, so demanded by them as aforesaid; and that the plaintiff, believing the said representations of the defendant Andrew Geddes, that there were no government lands for sale in the County of Wellington, and believing in the representations of the said defendants, that the said James Geddes was the owner of the lots, and that he had the right to sell the same, did pay the said defendants the said £50.

The second count was general, for extorting money from the plaintiff.

The third count was for money had and received to the plaintiff's use.

Defendant pleaded to the first and second counts, not guilty, and to the third count, not indebted.

At the trial, at Guelph, before *Burns, J.*, the plaintiff relied entirely upon the evidence of his brother to sustain this action, and the brother admitted that if it succeeded he intended to bring a similar one in respect of two other lots which he purchased at the same time. It appeared that the Rev. John McMaster, of Puslinch, had in September, 1855, written to the defendant Andrew Geddes as the Crown lands agent at Elora, making inquiry in respect of Crown lands, and the defendant Andrew Geddes replied to him as follows:

Crown lands' Office, Elora, 25th Sept., 1855.

THE REV. JOHN MCMASTER, PUSLINCH.

SIR,—Your kind letter of yesterday's date is before me, and not having any lands in Minto but what are disposed of, I made inquiry of my son, who is a land agent in this village, to see if he could accommodate your young friends. He examined his lists, and finds that he has 400 acres in one block in Minto, and other two hundred acres within three lots of the said block. His price for the good-will of each 100 acres is £30. There is one instalment paid on each lot. Now I think this is a good chance, when I tell you that the lots there are selling from £100 to £150 for the good will, but you can think and judge for yourself, but I am candid with you.

Yours very truly,

ANDREW GEDDES.

In consequence of this letter the two brothers called in October, 1855, upon Andrew Geddes, the Crown lands agent

to enquire about the Crown lands. The witness stated that Andrew Geddes told them there were no public lands for sale, but that his son, the other defendant, might have lands for sale, and shewed the plaintiff and himself into his son's office, which adjoined his own. James Geddes furnished them with lists of lands he had for sale, and among other lots was named 31, in the third concession of Minto. Nothing was then said about 29. At that time, however, the witness stated the plaintiff did not care about buying: it was the witness who then was desirous of buying. On the 5th of November afterwards the two went again to see the defendants, and then Andrew Geddes told them that 29 was a good lot, and they could have that. He called his son into his office and spoke about 29, and the son said they could have that lot as well as the others at the same rate, £30, and gave them a ticket, and entered their names for looking at it to see whether they would select it. After that the two brothers went to look at the lands, and the plaintiff, who then wished to purchase, selected the two lots 29 and 31, but not being able to go himself to see James Geddes, his brother transacted the business for him. On the 12th of November he saw Andrew Geddes, to whom he named the lots which they had selected, and he told him he would soon have all things ready for him. As they had selected four lots between them, the agreement was that they should pay £25 for each lot, as for the good-will of James Geddes. The witness said he paid to James Geddes at his house in the evening the sum of \$200 for 29 and 31, and then James Geddes produced to him two receipts as the first instalments of £3 15s., on each lot, and he paid that sum, \$30, in addition, and received the receipts for the plaintiff. Those receipts ran thus:

“Crown sale.

Crown Land Office, Elora, 12th Nov., 1855.

Received from Charles McMaster the sum of three pounds fifteen shillings currency, being the first instalment of ten per cent. on lot No. 29, in the 3rd concession of Minto, in the County of Wellington, containing 100 acres, more or less, sold to him at the rate of 7s. 6d. per acre, upon condi-

tion of actual settlement, and that no timber shall be cut or removed from the land (except for the purpose of clearing and building on the lot) until the whole purchase money, with interest thereon, is paid up. And that this sale is made upon the express understanding that no claim exists on the part of any person on account of improvements or otherwise.

ANDREW GEDDES,
Agent."

The plaintiff paid since that time two other instalments upon the lots. In the year 1858, and beginning of 1859, complaints having been made to the government of the conduct of Andrew Geddes as crown lands agent, an officer of the department was sent to Elora to search into the matter. This inquiry was made in March, 1859, and the plaintiff's brother was examined before such officer; and he said that upon that occasion James Geddes, who was also examined upon the subject, stated that a person of the name of James Rich, who lived in Hamilton, had bought these lots, 29 and 31, at the government sale of lands which took place at Elora in September, 1855, and that he, James Geddes, had purchased his right or good-will, and then afterwards sold them to the plaintiff. The witness stated that James Geddes did not say any thing at the time of the purchase by the plaintiff as to how he had acquired the lots.

In order to establish that these lots were public lands, and offered for sale by the government, the Canada Gazette, of the 4th of August, 1854, was put in, and there appeared an advertisement on the part of the crown lands department, that these lots with other lands would be offered for sale at the prices of 7s. 6d. per acre, at Elora, in the month of September, 1855. A book was then put in, which was kept in the office of the crown lands agent at Elora, as being the book which the plaintiff had given notice he desired to have put in evidence. When the book was produced the plaintiff denied that it was the book he wanted, or that it was the book which was kept of the auction sale of those lands in September, 1855. So far as any information to be derived from this book would go, it was, that lot 29 was claimed by one Horatio Wyse, and transferred to Charles McMaster, the plaintiff, on the 12th of November, 1855, the purchase money, 7s. 6d. per

acre; and as to lot 31, that it was claimed by one William Hinds, and also transferred to the plaintiff on the 12th of November, 1855.

A witness was called, who stated that he was present at the auction sale of the lands, and that a book was used there to enter the names of purchasers, but that the book produced was not that book.

The defendants called no witnesses.

On the part of the defendants, it was submitted that there was no sufficient evidence of any fraudulent representation by either of them, the custom being at those land sales for the original buyer to sell his right, and to pass it from one to another; and the person who desired to become the actual settler had his name inserted in the Crown lands books, and the agent's receipt for the payments was then given to him.

And that, as to the second count, there was no evidence to sustain a charge of money had and received by the two defendants to the plaintiff's use.

On the part of the plaintiff, it was contended that the count for money had and received would lie against both defendants if a false representation was made by one, and the other concurred and assisted in it, and brought about the result of the payment of money.

And as to the first count, that the evidence well sustained it, shewing that the agent represented there were no public lands for sale in Minto, whereas on the 12th of November, 1855, he gave the plaintiff the receipts put in, proving that then these lots were sold to the plaintiff as government lands, and that the statements made of other persons having bought the lots at public auction was a mere delusion, to enable the defendants to make some thing to their own advantage beyond the 7s. 6d. an acre, and that the means adopted in this case was to extort £50 from the plaintiff.

The learned judge put the following questions to the jury:

1. Whether as a fact Andrew Geddes made a false representation that there were no public lands for sale, with a view to have James Geddes sell these lots 29 and 31 to the plaintiff, in order to make an advantage from them?

2. Did the two defendants act in concert in the matter, or was it solely the act of one, and if so, of which of them?

The jury found in favour of the plaintiff on both points, and the verdict was entered for £62, subject to the opinion of the court.

Richards, Q. C., for the plaintiff.

Adam Wilson, Q. C., contra, cited *Rex v. Loggen*, 1 Str. 75.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff appears to us upon the evidence to have a perfectly just and meritorious cause of action against these defendants. No exception has been taken to the pleadings, and upon the finding of the jury, which is in accordance, we think, with the testimony, the verdict can in our opinion be sustained; and upon the common count for money had and received as well as upon the special count, which may be treated as a count in case for a false and deceitful representation, whereby the plaintiff has sustained damage.

As the defendants offered no evidence, the jury were warranted in assuming that the allegation that the lands had been actually sold at a former public land sale to certain persons whose rights had been bought up by James Geddes, or some one for whom he was agent, was a mere pretence set up by the two in order to avoid selling the land to the plaintiff at the government price of 7s. 6d. an acre, and to induce the plaintiff to pay a sum to extinguish the alleged right.

In our opinion the defendants' rule should be discharged.

Rule discharged.

CAMPBELL v. DAVIDSON.

County Court—Plea bringing title in question—Practice.

In the county court a plea was pleaded bringing title to land in question, and after a verdict for the plaintiff a new trial was granted, on the ground that the court had no jurisdiction.

On appeal the judgment was reversed, as the court having no jurisdiction could not grant a new trial.

The absence of the affidavit required by the statute with such plea will not warrant the court in proceeding, but would be ground for setting aside the plea.

APPEAL from the county court of Wellington.

The declaration was for rent due upon premises leased by plaintiff to defendant.

Among other pleas, defendant pleaded that before any rent fell due one C. became entitled to the reversion, and agreed to release defendant if he would give up possession to him, which defendant accordingly did. It appeared that no affidavit was annexed to this plea.

At the trial several questions arose, but no objection was taken to the jurisdiction, and the plaintiff obtained a verdict for \$66.

On motion for a new trial the learned judge, after deciding other points raised in the case, held that the plea above mentioned ousted the court of jurisdiction, and he therefore set aside the verdict, and granted a new trial without costs.

The plaintiff thereupon appealed.

Adam Crooks, for the appellant, cited *Powley v. Whitehead*, 16 U. C. R. 589.

M. C. Cameron, contra.

ROBINSON, C. J., delivered the judgment of the court.

The statute 19 & 20 Vic., ch. 90, sec. 20, clearly disabled the county court from entertaining jurisdiction in this case, an issue having been raised on the record which expressly brought in question the title to land.

It seems that no affidavit was annexed to the plea, such as is required by the earlier statute 8 Vic., ch. 13, sec. 13, but the absence of the affidavit, though it would, as we assume, have warranted the court below in setting aside the plea as irregularly pleaded, would not justify the court in proceeding in the action with such a plea on the record, contrary to the enactment in the 20th section of 19 & 20 Vic., ch. 90.

We can therefore only send back the record for the same reason as we did in *Powley v. Whitehead*, (16 U. C. R. 589.) We reverse the judgment granting the new trial, not upon any consideration of the grounds of that judgment, but because it was a judgment which the court, having no jurisdiction, was not competent to give.

The court below will take its course, in setting aside the plea for irregularity, or in wholly ceasing its proceedings, as it may be advised.

Appeal allowed.

FOSTER, V. CAMERON AND FRASER.

*Insufficient construction of drain by lessee—Injury to adjoining premises—
Liability of assignees of lessee—Evidence.*

One H. held a lease of certain premises, with a right of purchase, and assigned his interest to defendants in trust for creditors. The plaintiff in his declaration alleged that owing to the insufficient construction of a drain built by H., and continued by defendants and their tenants, the water and drainage escaped into the plaintiff's house adjoining, thus making it unhealthy, so that he could not lease it as he otherwise might have done. The plaintiff's evidence shewed that the drain from the defendants' house adjoined his cellar wall, and that, especially during rains, the water came into the cellar, so that he was obliged to abate the rent and build a new drain in consequence; but it was not clearly shewn that the injury was caused by the insufficiency of defendants' drains. *Held*, that it was properly left to the jury to say whether this did in fact occasion the injury, and that if so the defendants were liable.

The first count stated that the plaintiff was possessed of a house in the city of Toronto, which he used and still continued to use as a shop and dwelling house, and let and continued to let to tenants, for use as a shop and dwelling house; that one John Hutchinson was possessed of a house and premises adjoining the plaintiff's house, and constructed under his said house, and across his premises, and near the plaintiff's house, a drain leading through the premises to a public sewer, and for the purpose of receiving and conveying to the sewer the rain and water falling on and flowing from the house and premises, and for the purpose also of receiving and conveying the water, soil, and filth from a water-closet constructed and used in the said house of Hutchinson, but the said drain was constructed in so negligent, careless, unskilful and insufficient a manner, and of so small and insufficient size, that the rain, water, soil, and filth, could not flow through the same, but overflowed and oozed out, and flowed into the cellar of the plaintiff's house; that Hutchinson assigned and conveyed his house and premises, with the said drain and water-closet so used as aforesaid, to the defendants, and the defendants continued, and still continue the drain, so being insufficiently constructed, and of so small and insufficient size, and continued, and still continue, to receive in the drain the water, &c., and let the house and premises, with the drain so being improperly and insufficiently constructed, to be used

as aforesaid, to divers tenants, at and for certain rents agreed to be paid therefor, and the tenants by the authority of the defendants continued, and still continue, such use of the drain and water-closet; and by reason of such insufficient construction, the rain, water, &c., continued, and still continues, to overflow and ooze out of the drain, and to flow into the plaintiff's cellar, whereby the plaintiff was and is injured, and large quantities of water and filth accumulated, and still continue to accumulate therein, and caused noisome stench, and rendered the plaintiff's house unhealthy, and of less value as a shop and dwelling house, and the plaintiff was and is unable to let the same for so much rent as he otherwise could have done, and has been put to great trouble and expense in draining off the water and removing the filth.

Second count, charging defendants in a more general form, and alleging that they, the defendants, continued the drain to the plaintiff's injury.

Pleas.—1. Not guilty, to the whole declaration. 2. That the plaintiff was not possessed as alleged. 3. To the first count, that the drain was not constructed in a negligent and insufficient manner. 4. To the first count, that Hutchinson did not assign and convey the house and premises with the drain, &c., to the defendants, as alleged. 5. To so much of the first count as charges that the defendants let the house, &c., with the drain, &c., to tenants, and the tenants by authority of the defendants continued to use the drain, &c.; that they did not let the house with the drain, &c., as alleged, nor have the tenants by the authority of the defendants used the drain as alleged. 6. To the second count, that the defendants were not possessed as therein alleged.

At the trial at Toronto, before *Burns, J.*, it appeared that Hutchinson built the premises called the International Hotel, on the east side of Nelson Street, adjoining the plaintiff's house, which was to the south of the hotel. He had a lease of the ground with the right to purchase the fee. Between the houses was an arched gateway, and the drain for carrying off the water from the yard of the hotel, and the water falling upon the roofs, was constructed through the archway, and adjoining the party wall, and led into the main

sewer in Nelson Street, which in front of these houses was fifteen feet deep. At the time Hutchinson built the hotel there was constructed a water closet in it, the soil pipe of which led down along the party wall into the drain. That burst with the frost, and injured the plaintiff's house, for which the plaintiff's tenant, McCallum, brought an action some years ago. The present declaration complained of the same thing, but it was clear from the evidence that the plaintiff had no cause of complaint on that ground, for the mode of carrying off the water by the soil pipe had been changed after that action, and it was now carried down to the street in the hotel, and through the front wall of the house into the street, and there joined the gateway coming through the archway, and there was no possibility of any injury to the plaintiff arising from that cause.

Hutchinson, on the 28th of December, 1857, made an assignment of the hotel, and the lease of the ground, to the defendants, in trust for the benefit of creditors, and since then the defendants had leased the premises to tenants, who had held under them. The plaintiff had also leased his premises, but the tenant left on the 1st of December, 1858, and the premises were on the plaintiff's hands untenanted until the 19th of May, 1859. The tenant who left paid \$600 a year, rent, but the present tenant would pay no more for this year than \$500, on account of the nuisance of the cellar next the drain spoken of being wet. Evidence was given to shew that in the case of heavy rains the water came into the plaintiff's house along the whole depth of the house in the cellar, and that it would come through the wall about 15 to 18 inches above the floor of the cellar. This was observed on several occasions before the present tenant of the plaintiff began to occupy the premises on the 1st of May, 1859. The tenant stated that he would not take the premises until the plaintiff agreed to construct a drain from his cellar to the main sewer to carry off any water that might come in the way spoken of. The plaintiff did so construct a drain from his cellar at an expense of \$29, and his cellar never had a drain before that time. The plaintiff had a privy upon his premises, in the rear of the house, some six or seven feet

from his rear wall, and when he constructed this drain he also constructed a drain from the privy with it.

Evidence was given to shew that between the 1st of December, 1858, and the 1st of May, 1859, several persons made inquiries about renting from the plaintiff, but objections were made on account of the nuisance. There was no doubt from the evidence that the plaintiff's wall was wet from the same cause, and that when there were heavy rains more water than usual came through the wall upon the plaintiff's cellar floor next the drain under the archway.

The plaintiff contended that he could do no more than shew these facts, and leave it to be inferred that the cause of it must be the insufficient drain on the defendants' premises, or the bad construction of it, for he had no right to go upon the defendants' premises, and take up the drain in order to ascertain the cause.

The defendants called no witnesses, but made the following objections to the plaintiff's recovery:

1. That the plaintiff charged the defendants with doing an injury not permanent in its nature, and the action would not lie.

2. That there had not been any evidence offered by the plaintiff to shew that the drain on the defendants' premises had been insufficiently constructed or continued, and the defendants were not therefore called upon to shew affirmatively that the drain was properly constructed, and of sufficient dimensions.

3. That the defendants were not liable, for the fee simple was not in them, and therefore they were not reversioners, and the action could only be maintained against the tenant, if it could be maintained at all.

The learned judge left it to the jury to say whether the plaintiff had sustained an injury in consequence of the drain in the premises adjoining him; and to determine whether the drain was sufficiently constructed or not; directing them that if the injury proceeded from the operation of nature, irrespective of any work constructed upon the adjoining premises, then they were to find for the defendants, and that before the defendants could be liable the jury must be satisfied that the

plaintiff sustained an injury, and also that the injury was attributable to what the plaintiff complained of, namely, the improper or insufficient construction of the drain in question, and the use of it between the 1st of December, 1858, and the 1st of May, 1859, for the plaintiff had not any right to complain of a nuisance while his own premises were in the hands of tenants under him.

The jury found for the plaintiff £25 damages, and leave was reserved to the defendants to move to enter a nonsuit on the objections taken.

M. C. Cameron obtained a rule *nisi* to enter a nonsuit according to the leave reserved; or for a new trial, the verdict being contrary to law and evidence, and for misdirection, in the learned judge directing that the defendants, though not in possession of the premises from which the nuisance arose, and the injury not being permanent, were liable to this action. He cited *Rich v. Basterfield*, 4 C. B. 783.

C. S. Patterson shewed cause, and cited *McCallum v. Hutchinson*, 7 C. P. 508; *The King v. Pedly*, 1 A. & E. 822; *Thompson v. Gibson*, 7 M. & W. 456; *Alston v. Grant*, 3 E. & B. 128; *Russell v. Shenston*, 3 Q. B. 458; *Roswell v. Prior*, 12 Mod. 635.

ROBINSON, C. J., delivered the judgment of the court.

We think that upon the evidence we cannot say that the jury did wrong in finding for the plaintiff. The plaintiff sues for damage sustained by him as owner of the premises adjacent to the defendants from December, 1858, to May following, from his inability to let the house at a proper rent on account of the nuisance complained of: that is, the water coming through the wall of the plaintiff's house from defendants' premises, which the plaintiff attributes to the insufficiency of the defendants' drain.

That insufficiency was not distinctly proved, but it was left to the jury to say whether it must not reasonably be inferred from the facts proved that the defendants' premises must be defectively drained.

As to legal points, the defendants are holders of *Hutchinson's* term, and they have, as trustees of his estate, the

management and disposition of the property. Though they do not own the fee they are liable, we think, for any nuisance arising to the plaintiff from the defective draining of the cellar or premises, though they would not be liable for a nuisance arising wholly from the use made by their tenants of the premises let to them, as from some offensive trade carried on there, or some thing originally erected upon the premises by them during their tenancy. Though Mr. Cameron cited it to support the contrary, yet a careful examination of the case of *Rich v. Basterfield* (4 C. B. 783) and the authorities cited in it, brings us to the conclusion that if there has been such a nuisance as the plaintiff complains of, the defendants are under the circumstances proved liable for it, although the premises were at the time of the injury complained of in the occupation of defendants' tenants, for the damage to the plaintiff's dwelling house in this case did not arise from any act done by the tenants which produced the nuisance.

Rule discharged.

PEERS AND PEARSON V. CARRALL, SHERIFF.

Personal property—Devise in trust for widow and children—Execution against her—Sale—Estoppel.

One W. devised all his personal estate to three trustees, of whom his widow was one, in trust to call in and convert the securities into money, and when received to invest the same as they should think best, and pay the interest and produce thereof to his widow during her life, for the maintenance of herself and his children. The widow after the testator's death remained on his farm, and in possession of the stock and personal property, some of which she sold, and the stock had been added to by breeding. A writ of execution came into the sheriff's hands against her, and while it was there the two other trustees took from her a mortgage of all the personal property for advances made by them to her. The sheriff afterwards seized under the writ, and the two trustees forbade the sale, but it went on, and one of them bought the goods, and took a bill of sale from the sheriff, against whom they then brought an action for the seizure. *Held*, that they were not estopped by having purchased at the sale, but that having taken the mortgage from the widow while the writ was in the sheriff's hands, they could not allege that the goods were not then hers; and therefore that they could not recover.

Held, also, that the increase of the stock must be subject to the same rule as the stock.

Semle, that the property was liable, in the widow's hands, to the execution, which for all that appeared might have been for a debt contracted for the support of herself and family.

This was an action against the sheriff of Oxford and his

deputy, charging them with converting to their own use and wrongfully depriving the plaintiffs of the use and possession of divers goods.

Pleas.—1st. Not guilty. 2nd. That the goods were not the plaintiffs as alleged. 3rd. Leave and license.

At the trial, at Woodstock, before *Burns, J.*, the facts of the case appeared as follows: a person of the name of Frederick Welford, being possessed of a farm and farm-stock upon it, with other personal estate, made his will on the 23rd of March, 1854. By this will he constituted Benjamin Ellison, the plaintiff Peers, and his, the testator's wife, Mary Welford, trustees and executors and executrix thereof, and devised his real and personal estate to them in trust. With regard to the personal estate, the trustees were, "to call in and convert the securities, *and all other, my personal estate*, into money, and when received to invest the same in such securities, real or personal, as my said trustees shall think best, and the interest, dividends, and annual produce thereof, to pay to my said wife during her life, for the maintainance of herself, and the maintenance and education of my said children." By a codicil dated the next day, 24th of March, after reciting "by my said will hereunto annexed I have given to the trustees named the whole of my property, both real and personal, for the use of my wife Mary Welford, for the support of herself and the maintenance and education of my children;" then he devised, "now my desire is that my said wife shall only enjoy the said property so given by my said will so long as she continues my widow." The testator died shortly after making the will, and the executors named in it obtained probate thereof. By some arrangement between the widow and the plaintiff Peers, after Ellison's death, the other plaintiff, Pearson, was substituted in his place. No objection was raised by the defendants as to that. The widow, Mrs. Welford, continued to reside upon the farm owned by the testator, and she remained in possession of the farm stock and personal property, using the same for the purpose of working the farm, selling some of it, and for the maintenance of herself and family. Some of the sheep

were killed and used, and there was at the time of the execution coming to the hands of the sheriff some increase ; that is, not in numbers of the sheep as left by the testator, but new stock in place of the old. There were also some young cattle added to the cattle stock, the produce of the old stock.

The writ of execution upon which the defendant sold the property came into his hands on the 15th of July, 1858, at the suit of Taylor and others against Mrs. Welford and one William G. Elsworthy. While the writ was in the sheriff's hands the two plaintiffs, on the 28th of February, 1859, took a mortgage from Mrs. Welford to themselves upon the personal property, embracing all that had been left by the testator, and including the increase or produce of the stock, and also covering some articles which Mrs. Welford had herself purchased since her husband's death. This mortgage was expressed to be made in consideration of £342 paid by the plaintiffs to Mrs. Welford, and contained a proviso and covenant that she should pay that sum with interest in two years from the date. It was proved that the reason why the plaintiffs took this mortgage from Mrs. Welford was to protect themselves, as it was said they had made advances to her.

On the 29th of June, 1859, the sheriff made a warrant to an officer to seize the goods, and they were seized, and on the 8th of July, 1859, the plaintiffs gave notice to the sheriff that they claimed the goods and forbade the sheriff selling them. The sheriff's officer did, however, sell the same, and the plaintiff Peers bought and took a bill of sale from the sheriff on the 8th of July, 1859, in consideration of \$283.

The defendant's counsel objected,

1st. That the effect of the testator's will was to vest the property absolutely in the widow.

2nd. With respect to the increase of the farm stock, that it was liable to the execution, because that property must be considered as belonging to Mrs. Welford.

3rd. That the effect of the mortgage taken by the plaintiffs was to estop them from saying that the property was not that of Mrs. Welford.

4th. That if the effect of the will was to vest the property in the trustees, and not in Mrs. Welford, then she was herself one of the trustees, and should have been a plaintiff in this suit.

The learned judge directed the jury to assess the value of the whole of the property, with the exception of that part which clearly, without doubt, was liable to the execution, and the jury did so at £70 19s 6d., and they assessed the value of the property without taking into account the increase of the stock at £64 1s. 8d. A verdict was then entered for the defendant, and leave reserved to the plaintiffs to move to enter a verdict for them for one or other of the sums, if the court should be of opinion the plaintiffs were entitled to recover.

D. G. Miller obtained a rule *nisi* according to the leave reserved. He cited *Doe dem. Lord Downe v. Thompson*, 9 Q. B. 1037; *Right dem. Jefferys v. Blackwell*, 2 B. & Ad. 278; *Salter v. Kidley*, 1 Showers 59; *Newton v. Liddiard*, 12 Q. B. 926; *Stronghill v. Buck*, 14 Q. B. 787; *Edwards v. Brown*, 3 Y. & J. 423; *Young v. Raincock*, 7 C. B. 310; *Wiles v. Woodward*, 5 Ex. 557.

Beard shewed cause, and cited *Gordon v. Harper*, 7 T. R. 11; *Tancred v. Allgood*, 28 L. J. Ex. 362; *Bryant v. Easterson*, 32 L. T. Rep. 352; *Randall v. Russell* 3 Mer. 190.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiffs forbade the sale, and it cannot be said that it took place at their request, though rather than allow the property to be sacrificed and pass into the hands of strangers, they bought it. Such act does not, we think, estop them from complaining of the seizure and sale by the sheriff as illegal, though they would be estopped if the goods had been sold at their request, which, as we have stated, does not appear to have been the case. There is, however, something in the evidence of the bailiff Swayze, and in the fact of the plaintiffs receiving a written bill of sale from the sheriff after the auction, which looks as if the sale was, after

all, with their concurrence, for Swayze swears, "the deputy sheriff told him to be guided by Mr. Peers."

The increase of the stock, we think, belonged to the owner of the stock at the time. All would go by the same rule.

By the will Mrs. Welford and the other trustees were directed to sell the personal property and invest the money, and she was to be allowed to use the interest arising from it for the support of herself and her children.

The testator died, it seems, about five years ago. Instead of the trustees selling the property, it was allowed to remain in the widow's possession, who dealt with it as she pleased for the support of herself and her children, and while she so held it a *fi. fa.* came against her at the suit of a creditor.

We apprehend it was liable in her hands to execution for debts which, for all that appears, may have been contracted for the support of herself and family. But at any rate, as the plaintiffs took from her a mortgage of these goods while an execution against her goods was in the sheriff's hands and was current, they cannot in our opinion contend that they were at that moment not her goods, and that the writ could not attach upon them, though it is true that neither the sheriff nor the execution plaintiff was a party to that deed. And on the other ground, also, that the sale seems to have taken place with the concurrence of Peers, one of the plaintiffs, who are co-executors and trustees, we think the verdict for defendant should stand for the goods and increase of the stock, and of course for the things also which belonged to Mrs. Wilford independently of her husband's will, which could be legally seized without doubt. As to Pearson, he really had no interest at any time in the property.

LEITH V. O'NEILL AND CARROLL.

Notice of non-payment—Verdict on insufficient evidence—New trial refused.

Upon a plea denying notice of non-payment of a note, it appeared that the notice, though carelessly mailed by the notary on the day of protest to a wrong address, had been received by the defendant about a week after, and there was some slight proof of his having applied to the plaintiff for further time for payment. The jury were directed that the evidence was insufficient, but they nevertheless found for the plaintiff; and the court, though agreeing with the direction, refused to interfere.

ACTION on a promissory note made by O'Neill, dated 21st

April, 1859, payable to the defendant Carroll, for \$480, six months after date, at the Bank of Upper Canada, and by him endorsed.

The defendant O'Neill suffered judgment by default, and the defendant Carroll pleaded that he had not due notice of the dishonour of the note.

At the trial, at Toronto, before *Burns, J.*, the plaintiff relied on the following evidence to establish that due notice of dishonour had been given. The defendant Carroll had resided since 1851 near the town of Niagara. The note in question fell due on the 24th of October, 1859, and it was placed in the hands of a notary by the plaintiff to present and protest. No information was given to the notary as to the defendant's residence, and the defendant was a stranger to him. The notary said he made some inquiry about defendant, as nothing appeared upon the note to shew him where the defendant resided, and the note was made in Toronto, and he supposed that the defendant was some relation of the lawyer of the same name in Toronto, and probably lived in Toronto, and therefore addressed the notice, "Rev. John Carroll, Toronto," and put it in the post-office himself on the 24th of October, and paid one cent postage. He said he found out, after two or three weeks, that the defendant lived at Niagara. Bishop Charbonnell was then called, who stated that before the year 1851, the defendant did reside in Toronto, but left in that year to return to his former residence at Niagara. He said that the post-office had a box into which all the letters for the Catholic clergy were put when addressed to Toronto, and that the custom was for their messenger to call once at least, but generally twice a day, for such letters as might be put into the box. The letter in question he said he remembered quite well being brought to him. Another was brought at the same time, dated the 21st October, which was also a notice of protest from another notary of another note, and that letter was also addressed, "The Rev. John Carroll, Toronto P. O." The bishop said the one in question in this cause was inside of the other when brought to him. It was brought about the middle of the day, but what day or by what messenger he

could not remember. Thinking it was, perhaps, concerning some matters which the clergy could answer, he opened the letters, and when he saw what it was, and that it was a matter of importance to the defendant, he folded up the notice in question in this suit inside of the other, just as he received it, the same day he got it, and gave it to the messenger with directions to carry the same back to the post office, and inform the clerk that Mr. Carroll's address was Niagara. Whether the messenger carried it back the same day, he could not say, nor when he did so. The address "Toronto" was marked out with ink, and Niagara written over it, but the bishop said he did not do that, and did not know whose hand-writing it was.

These letters were both produced by the defendant to shew the post-marks, &c., upon them. The one in question had the Toronto post-mark of 24th October, and the other one the same of the 21st October.

The post-master of Toronto was called, and he stated that the alteration of the address to Niagara was not done in the post-office, and he concluded the letter must have been sealed up, and the one in question put inside of the other, and addressed before being returned to the post-office by the bishop, for the one in question bore no other post-mark than the Toronto post-mark, and the other one had the Clifton post-mark of November 1, and the Niagara post-mark of November 2; and besides, if the letters had been re-addressed at the post office, there would have been postage charged upon both, whereas the one in question was only stamped with the one cent postage, and the other was stamped as an unpaid letter, seven cents. He said the custom was, if a letter was wrongly addressed, and the address altered, then if the letter be put in the receiving box or given to one of the clerks, and he should put it into the receiving box, the custom was to re-mark and re-stamp the letter, though it were done the same day that it was first put in, but if handed to the clerk to be re-mailed because wrongly addressed, it would not be again re-stamped with the Toronto post-mark. The course of the post to Niagara was that a letter put in the Toronto post-office would reach Niagara the same day, or the

next day, or at farthest the day after. The letter in question, supposing it to have been inside of the other, reached Niagara, as the post-marks shewed, on the 2nd of November.

The maker of the note was called, and he said that the defendant had written to him on the subject of this or some other note, for there were others he had endorsed connected with the same matter, either before or after the note became due, he could not recollect, wishing for time, and desiring him to see the plaintiff about it. The letter was lost or mislaid. He could not find it, and he could not say that it related to this note. He could not go himself, and he sent his clerk to see the plaintiff. The clerk proved that he did call some time about the end of the month of October, and saw Mr. Read, a partner of the plaintiff, who sent him to the plaintiff. Mr. Read proved that the clerk did call upon him a couple of days or so after the note fell due, and he sent him to the plaintiff. Whether any or what proposition was made to the plaintiff, or what passed, was not stated.

The defendant was merely an accommodation endorser for the maker O'Neill, and O'Neill stated that he again was only surety to the plaintiff by means of the note, and that the plaintiff held a mortgage upon some land which had been the original consideration.

The learned judge told the jury that in his opinion there was not sufficient proof to sustain the issue in the plaintiff's favour. First, he remarked that there was no evidence that the notary had ever made an inquiry of the maker of the note where the endorser resided, nor had any information been furnished to him by the plaintiff or holder where to address the notice; but the notary thought, because he knew another person of the same name in Toronto, the defendant must be a relation of his, and therefore that he must reside in Toronto also. Secondly, that with respect to the notice, it was clear that the defendant did not get it until after the 2nd of November; but the question was not, however, when the defendant received it, but when did the notary or plaintiff send it: that the notice of dishonour was placed in the post office, on the 24th of October, and the defendant did not receive it till after the 2nd of November, and the

question was, whose fault it was that it was so : that the fault undoubtedly lay with the plaintiff for not having the letter properly addressed, and in his opinion the plaintiff could not rely upon the facts stated to cure his error, for he was no party whatever to what was done by the bishop, nor to what was done in the post-office afterwards. There was no evidence to show that the notice might not have lain several days in the post-office before being sent to the bishop, and there was no evidence to shew when it found its way back to the post-office again.

The jury, however, found a verdict for the plaintiff and damages £121 18s. 4d.

Cameron, Q. C., obtained a rule to shew cause why the verdict should not be set aside, on the grounds that the notice of dishonour was insufficient to charge the defendant, and that the verdict was contrary to law and evidence and the judge's charge. He cited *Byles on Bills*, 258, 260.

Read, Q. C., shewed cause, and cited *Baldwin v. Richardson*, 1 B. & C. 245 ; *Bateman v. Joseph*, 2 Camp. 462 ; *Burmester v. Barron*, 17 Q. B. 829 ; *Clarke v. Sharpe*, 3 M. & W. 166.

ROBINSON, C. J., delivered the judgment of the court.

We think the evidence was not sufficient to entitle the plaintiff to recover ; but there was an effort to give notice, and a mistake in addressing it, and the question at the trial was whether the notice, after all, was not still mailed in time after the mistake was discovered and rectified ; and there was an attempt to prove that Carroll had applied for indulgence after the note fell due, or about that time.

At the conclusion of the plaintiff's case, the defendant's counsel moved for a nonsuit, and the judge assented that he was entitled to it, but the plaintiff's counsel thinking, I suppose, that he might have some chance with the jury, refused to be nonsuited, and so the case went to the jury, and they found for the plaintiff against the defendant Carroll.

The charge of the learned judge was in the defendant's favour, so that no misdirection is complained of. The proceeding of the notary was exceedingly careless. He made

no inquiry about the endorser or his place of residence, but took it for granted that he lived in Toronto because the note was dated there, and because there was a gentleman of the same name living there, who he supposed was a relation.

On the other hand, it was proved that the defendant did receive the notice in about a week, if not in less time, and there was some evidence of his having about that time, or even earlier, applied for time to pay; though it was not clear whether such application referred to this note or another, for he had endorsed others for the same maker.

It is a question for the jury in all such cases whether due diligence has been used to find the residence of the endorser, and as the charge is not complained of, but was decidedly favourable to the defendant, we think it would be contrary to the course usually pursued if we were to set aside the verdict.

The cases cited by Mr. Read bear strongly against granting a new trial, considering the evidence, and the manner in which the case went to the jury.

Rule discharged.

BROWN ET AL. V. PAXTON ET AL.

Bond for the limits—Departure under authority of Speaker's warrant.

To an action on a bond to the limits, alleging a departure, defendants pleaded that the debtor, by virtue of a warrant of the Speaker of the House of Assembly, then in session, was required to leave the limits for the purpose of attending to be examined as a witness before said house, and that in accordance with said warrant, and to obey the same, he left the limits and remained away ten days, and immediately on his discharge therefrom returned.

Held, on demurrer, no defence, as it was not shewn that the Speaker knew the debtor to be on the limits, or what occasion there was for requiring his attendance, or that any process had issued by which he was placed in custody of any officer while absent.

This was an action by the plaintiffs, as assignees of the sheriff, against the defendants as bail to the limits for one Thomas Salmoni, assigning as a breach of the bond, that the said Salmoni "did depart the said gaol limits of the said county of Essex, in going to and being within the county of Simcoe."

Plea.—That at the time therein mentioned and stated in that behalf, the said Thomas Salmoni, under and by virtue

of a certain warrant or order of the Speaker of the House of Assembly, at that time in Provincial Parliament assembled, was ordered and required to depart from and leave the limits of the said county of Essex, for the purpose of attending at and being examined as a witness before the said House of Assembly so assembled as aforesaid, and to be and appear at the city of Toronto for that purpose, and not to return until discharged by the said house, and that under and by virtue of the said warrant or order the said Thomas Salmoni did, on the day and year in the breach mentioned, leave and depart from the limits of the said county of Essex, and under and in accordance therewith did remain from that time aforesaid, for and until the period of ten days thereafter, for the purpose of obeying the said warrant or order, and not in any way voluntarily, or on his own account or behoof, and that he did immediately return to the limits of the said county of Essex as soon as he was discharged from the said warrant or order as aforesaid, and that, since and except as above stated, the defendants say that the said Thomas Salmoni did not at the time in the said breach referred to, in any way leave, or was he in any way absent from, the limits of the said county of Essex, as in the said breach complained of.

Defendants demurred, on the ground that the plea contained no answer to the declaration, inasmuch as the plaintiffs complained of Thomas Salmoni therein named having departed the limits, not in his having gone to Toronto, (for which he had authority,) but in his having proceeded beyond, and into the county of Simcoe.

Eccles, Q. C., for the demurrer, cited 14 & 15 Vic., ch. 1, sec. 91; Tay. Ev. 1030 *et sequ.*

Prince, contra.

ROBINSON, C. J., delivered the judgment of the court.

There is certainly an apparent absurdity in the plea, that in consequence of Salmoni being ordered by a Speaker's warrant to come to and attend in Toronto, to give evidence before the House of Assembly, he committed, though invol-

untarily, the breach of the condition which he is charged with, that is, the "going to and being *within the county of Simcoe*," for the going to the county of Simcoe has no necessary connexion with his coming from the county of Essex to Toronto.

But it appears to us that on a more general ground the plea is not a sufficient answer to the declaration, for it does not state that any writ of *habeas corpus*, or any process whatever had issued, which placed Salmoni in the custody of an officer, but merely that under a *warrant* or order requiring him to attend, he left the limits and went to Toronto, and remained absent from the limits ten days. The defendant does not even say that Salmoni was known by the Speaker of the Assembly, or by the person who served such order as is spoken of, to be a prisoner for debt upon the limits, but simply relies on the fact that Salmoni being required by an order to go to Toronto went there. If this were to be held a sufficient justification for leaving the limits, it would only be necessary for any debtor on the limits to procure himself to be named among the witnesses required to attend before the House of Assembly, and he would be at liberty without further ceremony to go. This would give him an opportunity of going where he pleased, for he would be in no person's charge, and if such order would justify his departure there would be nobody responsible.

An important constitutional question might be started in discussing this plea, as to there being or not being a general power in the House of Assembly to require by warrant or order of the Speaker the attendance of any person to be examined as a witness before the house then in session, without specifying that it was for the purpose of *giving evidence* before an election committee, or before the house, in any matter connected with the trial of a contested election, or for what other purpose the witness was required. It is not necessary, however, to enter into this question, for we think it is clear that a prisoner in custody upon the limits of a gaol for debt, is not justified in leaving the limits in compliance with an order to attend before the House of Assembly to be examined as a witness, without its being shewn what

occasion there was for requiring his attendance, or that he was placed in the custody of an officer while he was absent from the limits attending upon the order. For all that appears, the Speaker of the Assembly may have been wholly ignorant of the fact of Salmoni being in legal custody for debt.

In Mr. Taylor's work on Evidence, sec. 1159, it is said, "If a person in custody is required to give evidence before the House of Commons, the Speaker usually issues his warrant, which is personally served on the gaoler by a messenger of the house, and by which he is directed to bring the witness in his custody to be examined. Some doubts, however, have been entertained as to the legality of this course, and on one or two occasions writs of *habeas corpus ad testificandum* have, in order to protect the gaoler, been applied for in the Court of Queen's Bench."

In our opinion the plea does not set up a good defence.

Judgment for plaintiffs on demurrer.

FERRIE V. CLEGHORN.

Assignment—22 Vic., ch. 96—Interpleader.

M. sold goods to P. and took back a mortgage on them for the price, together with P.'s note. Afterwards, and after the 22 Vic., ch. 96, M., who was then insolvent, assigned the mortgage to F., and F.'s agent received possession of the goods, most of which, if not all, had been originally purchased by M. from F., and were still unpaid for. The goods having been seized under an execution against M., an interpleader issue was directed between F. and the judgment creditor.

Held, that the assignment of the mortgage to F. was void under the statute 22 Vic., ch. 96; but that, putting it aside, M., as mortgagee, had no interest which could be sold under execution, and that F., therefore, having possession, was entitled to hold the goods as against the execution creditor.

APPEAL from the county court of Brant.

M. C. Cameron, for the appellant, (the plaintiff below,) cited *Squire v. Huetson*, 1 Q. B. 308; *Gale v. Burnell*, 7 Q. B. 850; *Porter v. Flintoff*, 6 C. P. 335; 22 Vic., ch. 96, sec. 19.

E. B. Wood, contra.

The facts of the case sufficiently appear in the judgment of the court, delivered by

ROBINSON, C. J.—One McDiarmid sold out a stock of goods to Pickard and McLean, and on the 25th of February, 1858, took back from them a mortgage upon the same goods (as we infer from the statement and evidence) as security for the price, taking also Pickard and McLean's note for the amount.

On the 13th of June, 1859, McDiarmid, being at that time in insolvent circumstances, executed an assignment to Ferrie of the chattel mortgage, and on the 19th of October, 1859, an agent of Ferrie, sent by him for that purpose, received actual possession of the goods in question, upon the joint delivery of Pickard and McDiarmid, who were both present, and Pickard being at the time of such delivery in actual possession of the goods.

It seems from the judgment given in the court below that these same goods had been bought by McDiarmid from Ferrie, and were yet unpaid for, but we doubt whether all of those goods had been bought from Ferrie. The mortgage given by Pickard and McLean to McDiarmid was not proved to have been filed with the county clerk, but as no objection on that account was taken, we assume that the mortgage to McDiarmid is admitted to have been valid, and that the only questions are in relation to the assignment of that mortgage by McDiarmid to Ferrie, and the effect of what was done under it. Besides, both parties to this interpleader issue are claiming through McDiarmid, against whom Cleghorn, the defendant in the issue, having obtained judgment, seized the goods in question soon after they had been placed by McDiarmid and Pickard in the possession of Ferrie's agent.

We do not think that there was any necessity for filing the assignment of the mortgage made to Ferrie under the Chattel Mortgage Act, and that any question there is in the case turns upon the objection made to that assignment taken by Ferrie from McDiarmid when he was insolvent, which was done after the statute 22 Vic., ch. 96, came in force. The effect of what passed between McDiarmid, Ferrie, and

Pickard and McLean, was that McDiarmid, while insolvent, made over the debt due to him by Pickard and McLean to Ferrie, to whom McDiarmid was indebted. If McDiarmid's debt was a debt contracted with Ferrie for the very same goods which were sold by McDiarmid to Pickard and McLean, it would certainly be more just that Ferrie should be paid for the goods than that while they were unpaid for to him they should go to pay other creditors of McDiarmid rateably with Ferrie.

Still we do not think we can do otherwise than apply the 19th clause of 22 Vic., ch. 96, to such a transaction, for the mortgage was given by McDiarmid to Ferrie, one of his creditors, as security for a sum of money with interest, and was so far a preference given to him over the other creditors, and it seems to be such a transaction as that statute prohibits, for it extends in terms to assignment of securities.

Pickard and McLean, it is true, for all that appears, were not insolvent, and they in conjunction turned out the goods to Ferrie's agent, who it may be admitted took them into his possession for Ferrie; but the goods were claimed and were delivered upon the mortgage that had been assigned by McDiarmid, and illegally assigned, as we assume, under the circumstances. It is only under that assignment that Ferrie claimed, or could claim them, and if the assignment was void Ferrie's title could not be good, whatever might be the consequences as between Pickard and McLean and Cleghorn, which need not now be considered.

This may seem to be a hard operation of the statute, but we do not see that we could deny its application to the case. To pay their own debt to McDiarmid, Pickard and McLean turned out these goods to be handed over by McDiarmid in payment of the debt to Ferrie. This was merely following up the assignment of the mortgage, and cannot have effect if that assignment itself must be held to be absolutely null and void as against the creditors of McDiarmid: that is, as against this defendant Cleghorn.

But there is another aspect in which this case requires to be looked at, and we confess there are difficulties in it which do not seem easy of solution.

McDiarmid owed Ferrie and Pickard, and McLean owed McDiarmid, and although McDiarmid was insolvent, yet if he had thought fit to pay his debt to Ferrie by giving him an order on Pickard and McLean, and the latter had paid it, we do not think the statute 22 Vic., ch. 93, could have reached that transaction, though it would have had the same effect of diminishing McDiarmid's assets, and rendering him unable to pay his other creditors.

So if McDiarmid, Pickard, and Ferrie had met together, and mutually agreed that Pickard and McLean should assume McDiarmid's debt, upon the understanding that Ferrie would take from them the goods in satisfaction of it, we do not see that the statute could have interfered with such an arrangement; but this was not a transaction of that kind.

It would appear rather, that McDiarmid, being willing to pay his debt to Ferrie by turning over to him his demand against Pickard and McLean, desired to put Ferrie in the same situation in regard to the goods and the mortgage as he himself had stood in, and that with that view McDiarmid taking a bailiff with him to Pickard and McLean, the latter with his concurrence put the bailiff in possession of the goods on behalf of Ferrie, for the purpose of their being sold under the power of sale contained in the mortgage then held by Ferrie, and that while the bailiff was taking measures for such sale, Cleghorn's *fi. fa.* was given to the sheriff, who went and seized the goods as being the goods of McDiarmid, the debtor in the *fi. fa.* But it is certain that if there had been no such arrangement as there was, shifting liabilities among the parties, yet McDiarmid would have held no interest in the goods upon which the *fi. fa.* could have attached, for the interest of a mortgagee in goods mortgaged to him is not an interest that can be sold under a *fi. fa.*, and Cleghorn could be in no better situation under his writ against McDiarmid after the latter had assigned or attempted to assign what interest he had to Ferrie. So the question is whether, the bailiff being in possession of the goods on behalf of Ferrie when the sheriff seized them, it was or was not competent to Ferrie to insist on the trial of this issue,

that, in the words of the issue, the property in the goods was in him as against the defendant Cleghorn; in other words, that he wanted no better title than possession to enable him to hold the goods as against an execution creditor, who according to his own shewing could have no right to seize the goods. In the case of *Edwards v. English*, (7 E. & B. 564,) the judgment of Lord Campbell supports this view, and it appears to us that the judgment given in the county court in favour of the plaintiff is correct, and that the appeal should be dismissed with costs.

Appeal dismissed.

McCARTHY V. THE CORPORATION OF THE VILLAGE OF
OSHAWA.

Village corporations—Duty to maintain crossings.

The plaintiff, living in an incorporated village, laid a plank from his door across the ditch to the street, by which he was in the habit of crossing, although the ditch was deep there, and he might, by going down the sidewalk a short distance, have crossed where it was shallow. In crossing by this plank at night he fell off and broke his leg; and he thereupon sued the corporation, alleging that it was their duty to have maintained a proper crossing from his house to the street.

Held, that there was no such duty incumbent on the defendants, and that the action could not be maintained.

The declaration stated that the plaintiff owned a lot in the village of Oshawa, at the head of a street called Mechanic street: that between his land and the street there was a ditch for draining the street: that it was the duty of the defendants to keep that ditch in proper repair, and to make and maintain a sufficient bridge or crossing over the ditch from the street to the plaintiff's land and dwelling house: that they neglected to do so: that the crossing there was insufficient, and the plaintiff, in crossing from the street to his dwelling house, fell into the ditch, and broke his leg.

Defendants pleaded,—1. Not guilty. 2. The same plea by statute. 3. That they were not possessed of the street, as the declaration alleged. 4. That the plaintiff was injured by his own carelessness, default and neglect. 5. That the plaintiff's cause of action did not arise within three months of the action brought. 6. That the street was not a highway, as alleged.

At the trial, at Whitby, before *Hagarty, J.*, an amendment was allowed to be made in the declaration, averring that it was the defendants' duty to make and maintain a bridge or crossing over the ditch to the plaintiff's land and house, and that they did not do so. Before the amendment, the statement was that the defendants did not keep the ditch in repair, and the injury was ascribed to their default in not doing that. The defendant objected to the amendment.

The evidence shewed that the ditch spoken of was an ordinary ditch on the edge of the street, intended as usual to be open, like the other side ditches in the village. The soil being loose, the ditch had become wider and deeper; and was, at the time of the accident, about six feet wide at the top and about three feet deep.

The plaintiff could, by going a short distance along the side-walk, have avoided the part where this deep ditch was, but in order to cross more directly from the street to his house, he had himself laid a single plank over the ditch, by which he was in the habit of crossing. This plank was narrow at one end, and so was unsteady, and coming home one night he fell off the plank and broke his thigh. He had never applied to the defendants to make a crossing from the street to his premises, and it was proved that the inhabitants in the village provided such crossings for themselves, none being provided by the corporation, except at the intersections of streets.

It was objected by the defendants' counsel that the defendants were entitled to notice of action: that the action should have been brought within three months; and that it was the plaintiff's own negligence to place there an insufficient plank.

Leave was reserved to move to enter a nonsuit or a verdict for the defendants on these objections.

Bell, (of Toronto,) obtained a rule *nisi* accordingly. He cited *Makinnon v. Penson*, 18 Eng. Rep. 509; 22 Vic., ch. 99, secs. 322, 323; 13 & 14 Vic., ch. 15, sec. 1.

Cameron, Q. C., shewed cause, and cited *Mayor, &c., of Lyme Regis v. Henley*, 2 Cl. & Fin. 354; *Whitehouse v.*

Birmingham Canal Co., 27 L. J. Ex. 25 ; Gibbs v. Trustees of the Liverpool Docks, *ib.* 321 ; Ruck v. Williams, 3 H. & N. 308 ; Grant on Corp. 501-2.

ROBINSON, C. J., delivered the judgment of the court.

The statute 13 & 14 Vic., ch. 15, sec. 1, which was cited in this case, does not apply to incorporated villages, but only to cities and towns, and any thing, therefore, that might turn upon provisions in that statute cannot affect the question before us. But the Municipal Act, 22 Vic., ch. 99, secs. 322, 323, extends the provisions of that statute to incorporated villages. If the street from which the plank was laid to the plaintiff's premises by himself was a public street, which we assume, then by the clauses of the Municipal Corporations Act just referred to, it was the duty of the corporation of the village to keep it in repair, and a right of action is given to any individual who may sustain damage from the neglect to do so. But then, any action on that ground must be brought within three months of the damage being suffered, as the statute requires, which this action was not ; and we do not see proof that the street was out of repair.

Then, as to the other ground of action introduced by the amendment—namely, the neglect of the defendants of an alleged duty to provide a bridge or crossing from the street to the plaintiff's land and house—no authority has been shewn for asserting that to be a duty incumbent on the corporation, and we do not think it is.

The public crossings or bridges over the side ditch at the intersection of streets is all that we see the corporations of cities, towns, and villages do in fact provide : it is all, so far as we have observed, that the inhabitants of towns expect them to provide, and we do not think that the duty could reasonably be extended further. If the plaintiff in this case had walked a few yards further along the street, he would have had the advantage of the public crossing over the ditch into the other street which intersected it, and from thence could have got conveniently upon his own land.

The plaintiff, like others, seems to have desired the convenience of crossing from the street directly opposite to his

own door, and he seems also to have taken upon himself to provide a crossing, but only by a single plank, which in the night time he should have considered it is not always safe to trust to, for the plank may easily have been shifted in its position so as not to rest firmly, or a false step may easily produce an accident.

We should be making a decision which would take all municipalities, both in town and country, by surprise, if we held that the defendants were chargeable with the accident which the plaintiff in this case unfortunately met with. The verdict must, we think, be set aside, and a verdict entered for the defendants on the leave reserved at the trial.

Rule absolute.

MCCARRALL V. WATKINS ET AL.

Assessment—Occupier—Omission to appeal—Replevin.

Semble, that a lessee of a house in a city cannot be assessed as occupier, when he no longer occupies it, although his term still continues: but, *Held*, that the plaintiff in this case having omitted to appeal was liable to pay the sum assessed against him, and therefore could not replevy his goods which had been seized.

APPEAL from the county court of York and Peel. This was an action of replevin for goods, in which the defendant Watkins, as collector of the ward of St. James, in the city of Toronto, avowed for a seizure as a distress for taxes in arrear.

At the trial the evidence was as follows:—

Alexander Munro, for the plaintiff, proved the seizure.

George Craig, for defendant.—I was one of the assessors for the city for the year 1858; I went to a vacant house on Church street; we served Dixon and the plaintiff on information of Dixon; the plaintiff's name is in assessor's roll for a house on Church street; the defendant was collector.

Cross-examined.—The house was vacant; the plaintiff is assessed as owner in the book.

Joseph Dixon for defendant.—I let a house to the plaintiff on Church street; began a little before the first of May, 1856, and continued until February, 1858, when he moved

out: the tenancy did not cease until May; I paid to defendant taxes from May to the end of the year; I sued plaintiff for rent up to the first of May, and recovered in the Division Court; he made no defence; plaintiff was to pay the taxes.

Cross-examined.—I do not think I did appeal.

Charles Daly, for defendant.—The book produced is the collector's roll for the ward of St. James; defendant was collector; assessment \$32.45. (He proved the assessor's roll.)

Cross-examined.—There was an appeal; I think Dixon appealed.

It was objected that the assessment was bad, because the house was vacant, and the jury had no right to assess the plaintiff as occupier of a vacant house. Leave was reserved to move to enter a verdict for the plaintiff on this ground, and a verdict was taken for the defendant.

Afterwards a new trial was ordered, the learned judge holding that the plaintiff having left the house before the assessment was made, and not being then the actual occupant, could not be assessed as occupier, although his tenancy still continued. From this decision the defendant appealed.

M. C. Cameron, for the appellant, cited 16 Vic., ch. 182; *The King v. The Inhabitants of Tynemouth*, 12 East 46; *The Queen v. Sterry*, 12 A. & E. 84; *Catteris v. Cowper*, 4 Taunt. 547.

Eccles, Q. C., contra.

ROBINSON, C. J., delivered the judgment of the court.

The first question in this case is whether a lessee of a house in the city of Toronto can be legally assessed as an occupier when he no longer occupies the house, having left it before the end of his term, which was still subsisting at the time of the assessment. Then there is a second question arising from the following facts:

The plaintiff was assessed *as owner*, the house being then vacant, and he had notice of his assessment served upon him, and omitted to appeal.

Upon the first point, whether under the circumstances the

plaintiff could be legally assessed as occupier, though he no longer occupied but had abandoned the premises, we incline at present to the opinion that he was not liable to be so assessed: that is, as occupier. But according to the notes furnished to us of the evidence it was not as occupier that the plaintiff was assessed, but *as owner*, and if that is correctly stated the question of the right to assess him as occupier does not arise.

But whether he was assessed on the roll as owner, or as occupier, it was incumbent upon him to appeal, or to petition under the 26th section of the statute, 16 Vic., ch. 182, if he meant to insist that his name had been wrongfully inserted on the roll. Having omitted to do so he became liable to pay the amount for which he stood assessed on the roll.

On that ground we think the verdict was properly rendered for the defendants at the trial, and that the judgment granting a new trial should be reversed, and the rule *nisi* discharged in the court below.

Appeal allowed.

JACOBS V. THE EQUITABLE INSURANCE COMPANY.

Further insurance without notice—Reasonable time—Right to begin.

See the facts of the case stated, 17 U. C. R. 35.

The jury having a second time found for the plaintiff, a new trial was granted without costs.

The only plea was a further insurance effected by the plaintiff, without notice to defendants or endorsement on their policy, on which issue was taken, and at the trial defendants admitted that if they should fail to prove their defence the plaintiff would be entitled to a verdict for the full amount insured. *Held, per Robinson, C. J.*, that they were entitled to begin.

The further insurance having subsisted for fourteen days only before it was cancelled, it was argued that a reasonable time must be allowed to give notice of it to the plaintiffs, and procure the endorsement, and that this was a question for the jury; but

Held, per Burns, J., that the question was not properly presented by the pleadings, and that the plaintiff having given no notice at all, though he had ample time to do it, the question of reasonable time could not arise.

It was contended also that the second insurance was void, owing to an omission by the plaintiff to comply with its conditions, but *held* that it was nevertheless an insurance within the meaning of the condition in defendants' policy.

ACTION on a policy of insurance of goods against fire, for £600.

The only plea was that while this policy was in force, and was subject to a condition against double insurance without notice to, and sanction of the defendants, (which condition was set out in the plea,) namely, on the 16th of June, 1857, the plaintiff effected a further insurance on the same goods with the Wellington District Mutual Fire Insurance Company, for the further sum of £500, and that the plaintiff did not give notice to the defendants of such other insurance, nor was the said insurance stated in the policy in the declaration mentioned, or endorsed thereon, contrary to the said condition, whereby the said policy in the declaration mentioned became and is void.

Issue was taken upon this plea.

The facts of the case are fully stated in the report of a former application for a new trial, 17 U. C. R. 35. See also 18 U. C. R. 14, 373.

At the trial, at Toronto, before *Richards*, J., at the opening of the case the defendants' counsel admitted that if he did not prove his plea the plaintiff would be entitled to a verdict for the whole sum insured, £600, and interest, and he claimed a right to begin, as the jury would have nothing to consider about damages, and the issue lay wholly on defendants' plea. The plaintiff was, however, allowed to begin, and upon evidence substantially the same as at the former trial, the jury found for the plaintiff, £632 19s. 6d. damages.

Galt, Q. C., obtained a rule *nisi* for a new trial without costs, on the ground that the verdict was perversely rendered contrary to law and evidence, and the judge's charge. And because the plaintiff was allowed to begin at the trial, although the proof of the issue lay entirely on the defendants.

Freeman, Q. C., and *Adam Wilson* shewed cause, and cited *Carpenter v. The Providence Washington Ins. Co.*, 16 Peters 496; *McEwen v. The Montgomery County Mutual Ins. Co.*, 5 Hill 101; *Potter v. The Ontario and Livingston Mutual Ins. Co.*, *ib.* 147.

Anderson supported the rule, citing *Tay. Ev.*, secs. 354,

355 ; Mercer v. Whall, 5 Q. B. 447 ; Chapman v. Rawson, 8 Q. B. 673 ; Ashby v. Bates, 15 M. & W. 589 ; Smith v. McKay, 10 U. C. R. 412, 613.

ROBINSON, C. J.—As to the right to begin, there being but one plea on the record, setting up as matter of defence certain facts which being denied it lay upon the defendants to prove, there is no doubt the onus of proof of the affirmative of the only issue on the record rested with them ; and according to the settled rule of practice they would have had the right to begin, without doubt, unless the plaintiff had occasion to go to the jury on the question what amount of damages he should be allowed to recover.

There was here no such question, after the defendants at the trial consented that the plaintiff should have a verdict for the whole amount of his insurance, if the jury did not find against him upon the plea ; and I am of opinion that the defendants were under the circumstances entitled to begin.

It would not by any means follow as of course that a new trial should be granted, because the rule in that respect was not rightly applied, but in a case of this description it would be most likely to be very disadvantageous to the defendants to be deprived of the opportunity of combating the arguments used to the jury to lead them to reject the defence. It is at least a circumstance that should have weight in disposing of the application for a new trial.

As to the merits, it appears to me that the evidence given upon this last trial placed the defence on ground even clearer than at the former trials. The facts were more fully investigated, and I must say that the defendants were entitled to a verdict by the express condition of the policy on which their defence was rested. We need not recapitulate facts and evidence which have been already several times stated by us in disposing of this case. It is sufficient to refer to the policy as recited in former reports of this case, and to observe that there was a strong appearance of this being a case in which the justice of the protection which that condition was meant to afford is most apparent.

The plaintiff having already several insurances, and, as there is reason to believe, above the real value of the goods insured, an additional insurance was applied for upon the building to the agent of another office, which already had granted a policy upon the goods. The inspection of the premises which the agent made on that occasion made so strong an impression upon his mind that the plaintiff was over-insured as regarded his goods, that he lost not a moment in cancelling the policy upon the plaintiff's goods which had been granted from his office.

Very shortly after this the fire occurred. In the interval the defendants would have had the same opportunity of saving themselves from the perilous position of having to insure for the safety of goods that were insured above the value, if they had known in time of the insurance that had been effected with the Wellington Insurance Company. That, however, had been suffered to exist a fortnight, without notice of it having been given to the defendants or their agent, and without having it endorsed on the policy, as the condition requires, though the parties lived in the same village and were constantly meeting. The defendants are entitled, I think, to a verdict upon the plea, which was distinctly and clearly proved, as the jury were told.

As to the arguments that the insurance effected with the Wellington office was void, and so was no insurance, because the plaintiff desired and intended to have some alteration made in it, and because the other insurance was not noted upon it or inserted in it, they do not, I think, at all interfere with the operation of the condition in the defendants' policy. There was an insurance in fact with the Wellington office for a fortnight, and though it is possible that that Company may have had reason to complain of some condition in it, yet it would rest with them to take the exception or not as they might think proper. *Primâ facie* it was not void, but voidable, perhaps, at their discretion, and until it was last cancelled it was a policy which came within the condition relied upon in the defendants' plea, and of which it was necessary that the defendants should have had notice, and which it was necessary they should

have endorsed on the policy, in order to manifest their knowledge and approbation of it.

BURNS, J.—The argument on behalf of the plaintiff to support the verdict is involved in two propositions:—1st. That the insurance effected by the plaintiff with the Wellington Mutual Company was in truth no effectual insurance, because it was void *ab initio*, and therefore there was no necessity for the plaintiff giving notice of it to the defendants or having it endorsed on the policy sued on. 2ndly. Supposing it to be a subsisting policy for the time being before it was cancelled, yet the plaintiff must be allowed a reasonable time to give notice of it to the Company, and the Company must be allowed a reasonable time to say whether under the circumstances they will allow their policy to continue in force or not; and that this is a question for a jury.

Independent of the question whether these propositions be sustainable upon the evidence, there is great force in the argument on the part of the defendants that neither of these questions are presented properly upon the record. The defendants have pleaded the violation of the condition upon which their policy was to subsist, in this, that the plaintiff insured in another Company, and gave them no notice of it, and had not that other insurance noted on the policy. The plaintiff simply traverses the plea. It may be that the first proposition is properly in question under that issue, for it may be said, if the policy with the Gore Mutual was no insurance at all; then the plaintiff is not wrong in simply traversing the plea, because it must be an effectual insurance which is to have the effect of destroying the contract with the defendants. The other proposition, however, is clearly inconsistent with the issue presented, for if it is to be admitted that the insurance with the Wellington Mutual did subsist, but that time was an ingredient in the question whether the defendants' policy was also to subsist at the same time, then that question should have been presented upon the record for trial. Upon these pleadings, however, no such question is presented.

Waiving technicalities and discussing them upon their merits may be of use to the parties in any further proceedings, for the case has now been several times before the court.

The plaintiff's first proposition divides itself into two matters, which have been argued and require consideration. First, that the plaintiff in truth never himself considered the policy in the Gore Mutual as a subsisting policy; and, secondly, that the condition in that policy not having been complied with rendered it void from the commencement.

With respect to the first of these, the plaintiff complains that he was not allowed to give evidence at the trial, though tendered, for the purpose of shewing that the plaintiff, the day after he received the policy of the Gore Mutual declared it was not right, and that he must return it for correction. The inference which the plaintiff wished to have drawn from that was that he intended no fraud. The learned judge rightly rejected that evidence. Granting that the plaintiff did not intend any fraud, that however was not the question; the point was simply whether in fact there was a subsisting insurance or not. What the plaintiff might have said about the policy not being exactly to his wishes, and that he wanted it corrected, never could be any evidence as against these defendants in an action on their contract. There is therefore nothing in the plaintiff's complaint on that point.

The condition in the Gore Mutual policy is to this effect: "notice of all previous insurances upon property insured by this Company shall be given to them, and endorsed upon this policy, or otherwise acknowledged by the Company in writing, at or before the time of their making insurance thereon, otherwise the policy subscribed by this Company shall be of no effect." No endorsement was made on the policy, which was granted on the 16th of June, 1857. Whether there was any acknowledgment of the previous insurance in writing did not positively appear, but I take it for granted none was given. The agent of that Company stated he was aware of the previous insurance with the defendants, but omitted noting it on the policy through inad-

vertence. The Gore Mutual cancelled their insurance on the 30th of June. Now that was not so cancelled because it was considered void in consequence of the previous insurance, but because the agent of that Company thought the plaintiff had not the quantity of goods which he had insured. It is plain the Gore Mutual Company acted upon the principle of their policy being a subsisting one for those fourteen days. The condition embodied in their policy was for their benefit, and they might or not take advantage of it. If the evidence of the agent of that Company be correct, the Gore Mutual Company could have been compelled to make the contract perfect. The question, however, to be determined here, is not whether the plaintiff could have legally recovered from the Gore Mutual in an action upon their policy if a fire had occurred during those fourteen days, but it is whether a double insurance *de facto* existed. This point has several times been considered in this court, as in other courts, and that is the meaning which has always been put upon these contracts.

It was not pretended the plaintiff ever notified the defendants or their agent that he had effected the insurance with the Gore Mutual until the fire occurred. The agent heard of the second insurance after that policy had been cancelled. No excuse appears upon the record why the plaintiff did not notify or have the second insurance noted upon defendants' policy. The plea therefore was strictly true both in law and fact, and the verdict is not only contrary to law, but perverse upon the facts, for the jury were properly enough instructed, and the evidence exceedingly plain.

This result is the only proper conclusion to be arrived at, unless Mr. Freeman's second proposition can be allowed to influence the decision, and that is, that the plaintiff must be allowed a reasonable time to give the notice, and the Company a reasonable time to determine whether they will continue their insurance or not. Here however the plaintiff gave no notice at all. His argument is that the second policy was cancelled in fourteen days after it was given, and therefore a notice need not be given. That argument is a convenient one to adopt now, after the expiration of the

time the second policy was in force, but we must deal with it as if the fire had occurred during those fourteen days. The act of further insurance is the plaintiff's own act, and he must communicate what he does to the Company. Without laying down any rule upon the subject, as to how soon he should apprise the defendants of having effected a second insurance, or whether in the mean time he would have the benefit of the policy, or upon whom the risk lay in the interval, it is sufficient to say in this case that the plaintiff never having given any notice at all of the second policy, (and he had abundance of time to do so before the fire occurred,) no question of reasonable time can possibly arise.

McLEAN, J., concurred.

Rule absolute, without costs.

THE SAME CASE. (a)

On a third trial of this case a verdict was found for the defendants, the learned judge having charged that the defendants had proved their plea, and not left it to the jury to say whether the plaintiff had given notice to them of the further insurance within a reasonable time. The court held the direction right, and refused a rule.

This cause was tried a third time at Toronto, before *Hagarty, J.*, and the jury then gave their verdict for the defendants.

Freeman, Q. C., moved for a new trial, for misdirection in this, that the learned judge charged the jury to the effect that the evidence shewed that the plaintiff had effected a further insurance on his goods in the Wellington District Mutual Fire Insurance Company after the effecting of the policy sued upon, and had not given notice thereof to the defendants, nor had it stated in their policy nor endorsed on it, and directed them to find a verdict for the defendants, whereas such policy effected in the Wellington District Mutual Fire Insurance Company was upon the face of it defective and voidable, and was so considered by the plaintiff, and there was evidence that the defendants had notice of this second policy, and every thing concerning it, from the

(a) Decided in Easter Term, 1860, but reported here as connected with the previous decision.

plaintiff, before the fire occurred, and made no objection to their policy continuing valid and binding upon them, and afterwards treated the same as subsisting by noting another policy on the same goods, effected by the plaintiff with the British America Insurance Company thereon, according to the requirements thereof.

And for the rejection of material legal evidence tendered at the trial, to the effect that the said second policy was defective and voidable on the ground that the policy of the defendants was not acknowledged therein as required by the condition thereof, and that the plaintiff looked upon and considered such second policy as being defective and invalid, and for this reason omitted to give immediate notice thereof; and because the learned judge should have received such evidence and left it to the jury, or should have left it to the jury without such evidence, to say whether notice of what had been done in reference to the said second policy had not been given to the defendants within a reasonable time under all the circumstances, or whether the defendants, after they received notice of what had been done in reference to the second policy, elected to continue their risk, and if the jury in either case found in the affirmative they should find a verdict for the plaintiff.

ROBINSON, C. J., delivered the judgment of the court.

We think there is no ground for a rule. The motion made by the plaintiff's counsel shews the particular objections taken by him so fully, that if it is desired the judgment of the court of appeal can be taken upon them, and thus the several points on which this court has already repeatedly stated its opinion will be finally settled. Retaining the opinions which we have on more than one occasion stated at length in this case, we grant no rule to set aside the verdict. The only point that can be looked upon as not necessarily decided by us already between these parties, is that objection stated in the motion paper, that the learned judge at the trial did not expressly submit it as a question to the jury whether the plaintiff had given notice to the defendant within a reasonable time of his insurance with the Wellington District Mutual Insurance Company, but stated to the jury

that the defendants had proved their plea, and were therefore in his opinion entitled to a verdict. If the view which we have formerly stated in judgments given in this case be correct there was nothing wrong in that, for, in the first place, the condition in the policy says nothing about reasonable time, and, in the next place, the giving notice is not all that the condition requires, nor indeed is that what the condition does require, otherwise than from necessary implication, for what is alone made necessary by the condition—namely, the insertion of that new insurance either in the policy or by endorsement on it—could not take place without such notice. If the plaintiff had given notice, and had not taken care to have it endorsed on the policy, the condition would not have been complied with. The endorsement is what is required to be proved, and it is evident that when the plaintiff and the defendants' agent lived quite near each other, and yet the plaintiff was insured with the Wellington District Mutual Insurance Company for a fortnight or more, without giving any intimation of it to the defendants, notice was not given in a reasonable time. The condition of the policy was violated, and we have no discretion to hold that such breach of the condition has no legal effect.

Where so many frauds upon insurance companies are committed, and many more attempted, it is a matter of consequence in a public point of view, to say nothing of the rights of the parties to the transaction, that stipulations which are intended to guard against such frauds shall be allowed to have their legal effect according to the contract.

Rule refused.

SMITH V. THE CORPORATION OF THE VILLAGE OF
COLLINGWOOD.

*School teacher—Order on municipality for his salary—Acceptance of treasurer—
Refusal to levy rate—Right of action.*

Held, that an action would not lie against a municipal corporation by a school teacher, upon an order made upon and accepted by the treasurer in the plaintiff's favour for his salary, the treasurer having no power to bind the corporation by such acceptance.

Held, also, that the teacher could not maintain an action against the corporation for refusing to levy a rate for his salary, upon an estimate furnished to them for that purpose by the trustees.

This was an action by the plaintiff, a school teacher, against the corporation, for not paying him his salary or allowance.

The declaration contained seven counts.

The first count was on an order made on the 10th of January, 1859, by the school trustees of Collingwood, by their chairman, on the treasurer of the town of Collingwood, to pay the plaintiff £17 13s. 5d., "which the defendants by the hands of their treasurer accepted."

The second count was on an order upon the treasurer by the school trustees, made by their chairman on the 4th of July, 1859, in favour of the plaintiff, for £62 10s., which the defendants by their treasurer accepted.

The third count was on an order made by the school trustees on the 23rd of August, 1859, by their chairman, on the treasurer of Collingwood, to pay to the plaintiff \$6.95, accepted in the same manner.

The fourth count was for money had and received, which was clearly not supported by the evidence, and on which therefore the defendants had a verdict.

The fifth count alleged that the plaintiff was a common school teacher in the town of Collingwood for twelve months: that the school trustees, on the 22nd of March, 1858, laid before the defendants an estimate of the sum required for paying the plaintiff his salary as such teacher, in order that the same might be levied on the rateable inhabitants according to law: that it became thereupon the duty of the defendants to levy a rate in order to make such payment; but that the defendants, though they gave to the plaintiff an order on their treasurer to pay the plaintiff £17 13s. 5d. for the salary then due to him, would not provide the said sum, nor levy, nor impose, nor collect a rate for the payment of the same, but neglected and refused so to do, whereby the plaintiff was deprived of his salary as such teacher.

In the sixth and seventh counts the plaintiff complained in the same manner of the defendants, for neglecting and refusing to impose or collect a rate for paying the sums due to the plaintiff, for which they had given the other two orders on their treasurer which were declared on in the second and third counts.

The defendants pleaded to the first count, that they did not accept the order mentioned in that count; and payment.

To the second and third counts, that they did not accept.

To the fifth count, that they did provide the money, and collect and impose a rate.

To the sixth and seventh counts, the same plea.

And to the sixth count defendants also pleaded, that they did impose the rate, and delivered the roll for collecting it, and the other assessments for the town of Collingwood for the year 1859, but that the day fixed for the return of such collector's roll had not yet expired, and that they had not yet received the said sum for the school trustees.

Issue was joined on all the pleas.

There was a case tried at the same assizes, at Barrie, before *Robinson*, C. J., brought in the Court of Common Pleas, in which Munson, another school teacher, sued the same corporation of Collingwood upon similar causes of action, the declaration and the pleadings being substantially the same as in this case. And it was agreed that the evidence given in that case should be submitted to the jury as evidence given in the present case, in order to shew the grounds upon which the corporation was sought to be charged, and what they relied upon as their defence. (a)

The evidence shewed that the orders were in each case signed by the chairman of the board of school trustees, and were sealed with their seal, and they were accepted by the treasurer under his signature merely as treasurer.

The clerk of the corporation produced and proved an estimate that had been furnished by the school trustees of the money that would be required to be raised for school purposes in 1858, which estimate included the plaintiff's salary. A by-law was afterwards passed to raise money for certain school purposes; to wit, for school houses, library and apparatus. The money required for teachers' salaries in that year was raised by a rate imposed by resolution, and the whole money required for that year seemed to have been levied.

The corporation received in like manner from the school trustees an estimate of the money required for school pur-

(a) See that case reported, 9 C. P. 497.

poses for 1859. That also included the teachers' salaries, including the plaintiff's. A by-law was introduced to raise that money by assessment, but it was not passed. It was read a second time on the 25th of July, 1859, but was neither passed nor rejected; nothing was afterwards done upon it.

The clerk of the corporation explained that the salary of the plaintiff should have been paid: that the government contributed a portion of the school money, and that the school trustees had power to make up the deficiency by rate, and so also had the corporation of Collingwood. He swore that a small portion only of the taxes for 1858 had been collected; and that he thought, but was not sure, that enough money had been collected on the roll generally to cover teachers' salaries.

The chairman of the board of school trustees, who was at the same time a member of the town council, swore that in 1858, which was the first year of the existence of the corporation, the municipal council paid people whom they employed to make and improve their streets by giving them orders on their treasurer: that these orders got into circulation, and many persons paid their taxes with them, so that there was not enough actually collected in money to pay the school teachers: that the government grant would in common course be received by the end of June in each year, and the residue of school moneys required for the year had to be raised by rate; but that for some reason which he was not aware of, the government grant for school purposes for Collingwood for the first half of 1859 had not yet been received when he gave his evidence.

It was objected in each case, on the part of the defendants, that there could be no action against the corporation upon their alleged acceptance of the orders, and that at any rate an acceptance to bind them must be under the corporate seal; and that the corporation was not liable to be sued upon such causes of action as were stated in the special counts.

The learned Chief Justice said, that as to the objections to the sufficiency of the several counts they should be taken upon demurrer, or might yet be urged in arrest of judgment,

but could not be gone into at *nisi prius*, where the only matter to be considered was the application of the evidence to the different issues of fact that had been joined.

The jury found for the defendants on the fourth count, and for the plaintiff on the others, with £69 8s. 2d. damages.

R. A. Harrison obtained a rule *nisi* to arrest judgment on the six counts on which the plaintiff recovered; or for a new trial on the law and evidence, on the ground that the treasurer of the corporation was the only party liable on the orders, and not the defendants, who had not bound themselves under their seal, and who could not be made liable on the treasurer's acceptance of such orders; and because on the matters stated in the fifth, sixth, and seventh counts, there was no remedy by action. He cited *Quin v. The School Trustees of Seymour*, 7 U. C. R. 130; *Tapping on Mandamus*, 93, 347.

McMichael shewed cause.

The statutes bearing upon the question are referred to in the judgments.

ROBINSON, C. J.—The same points precisely being before the Court of Common Pleas and this court upon the same evidence, the judges have communicated together upon the points involved, and agree in the same conclusions, upon grounds which need not be gone into at length in each court. I will therefore only shortly state, that as regards the orders of the school trustees accepted by the treasurer of the corporation of Collingwood, they must be looked upon as given in pursuance of the statute 13 & 14 Vic., ch. 48, sec. 24, sub-sec. 8, and sec. 26, which makes it the duty of the school trustees of incorporated villages to give orders to teachers and other school officers, and creditors, upon the treasurer of each incorporated village for the sums which shall be due them. It appeared to me at the trial, that if we could in consequence of this provision look upon the incorporated village as in the light of a trading corporation authorised to make notes, or draw and accept bills, it might be found that it would follow as a consequence that they might transact

such business in the same manner as it would be transacted by individuals; that is through their proper officers, by whose signatures merely the corporation might for such purposes be held bound; and it would not be necessary that the corporate seal should be applied on such occasions. I ruled therefore for the time, that the acceptance by the treasurer of orders authorised by statute to be drawn upon him might be taken to be the acceptance of such orders for the corporation, and that if there was any thing in the school acts or the municipal acts which would affect the question, it would be open to the defendants to move in term on any verdict that might be given for the plaintiff. It was understood at the trial that as the cases were new in their nature, the questions on which they must turn would be discussed in term in both courts, and in order to ascertain the amount for which the plaintiff might recover if found entitled to support any of the causes of action, a verdict was given for the amount which was shewn or rather admitted to be due in each case. We have now to consider the two classes of counts, and the answers given to them so far as may be necessary.

As to the three counts upon the orders, we think that we cannot look upon the provision in the School Act under which they were given, and which I have recited, as meant to serve any other purpose than as a voucher from the school trustees, which should shew the treasurer of the municipality that the person in whose favour it was given had a claim upon the school funds as a teacher, whose services and the amount due for them had been ascertained by the trustees.

The order when complied with would of course acquit the corporation as to so much of the school fund as the treasurer should have paid upon it; but I do not think that the acceptance of the order under the hand of the treasurer had the effect of giving a right of action to the trustees against the corporation, in the same manner as a bank or other trading corporation would be liable upon a check or bill accepted by their cashier.

Whether the corporation were bound to pay an order drawn on their treasurer, and when, and under what circumstances, must depend upon something more than the fact of

the treasurer having accepted their order. He has not power, I think, to bind the corporation by his personal acceptance to pay immediately, without regard to any other consideration but merely the fact of his having written "accepted" upon the order.

The statutes give no general power in terms to the treasurers of municipal corporations to bind the corporations by their acceptance, and we must find something in the statute from which such a power can be properly implied in any particular case before we can hold that it is given or implied in such case.

As to school moneys, we find they come in part from provincial funds, and in part from funds to be raised by assessments, and regard must be had to the fact whether the corporation is in funds to make any payment out of school moneys upon an order of school trustees at the time of such order being presented; and if they are not in funds, the right to demand payment nevertheless may depend upon questions which the treasurer has not the discretion to settle by his acceptance. This acceptance, I think, has no other effect than to mark the time and fact of the order being presented, which may be of consequence to the teacher as regards the order of payment under circumstances that may sometimes exist.

I think, therefore, that judgment should be arrested as regards the first three counts.

With respect to the last three counts, we find no instance of an action against a municipal corporation for not levying a rate for a public purpose, in which rate the individual bringing the action has no other interest than as one of a class who would have a claim to be paid out of such assessment if it were raised; and if an action on such a cause as is set out in the last three counts respectively is not maintainable, that objection cannot be held to be cured by pleading over, for it is not only a substantial objection, but one that goes to the very root of the action. No authority has been cited in support of the declaration as regards these counts, and we ought not to decide in its favour except upon the clearest ground, when we consider that it cannot be

truly said that the plaintiff's salary is unpaid, because the municipal corporation has not imposed and collected a rate for school purposes, for by the School Act the school trustees who contracted with the plaintiff to employ him and pay him, have express authority given to them to levy themselves whatever money might be necessary for enabling them to fulfil their contract.

I am of opinion that the rule must be made absolute for arresting the judgment on the last three counts, as well as on the first three.

BURNS, J.—With respect to the first three counts, I think the plaintiff cannot maintain an action against the corporation, treating it as bound by the acceptance of the orders of the trustees. The effect of so holding would be treating the orders in the nature of bills of exchange. These orders were given in compliance with the 8th sub-section of section 24, of the school act, 1850, and with them in his hand the plaintiff was entitled to call on the treasurer for payment, but the treasurer could not bind the corporation by any acceptance he might write upon them. The liability to pay must depend upon something else than what the treasurer may choose to say about it.

Then with respect to the last three counts, charging the defendants with a breach of duty in not levying a rate in order to pay the orders, after some doubt and hesitation I have at last settled into the opinion that the plaintiff cannot maintain such action. If it were shewn that the rate was levied and the money in hand, I have no doubt an action for breach of duty in not paying it would lie. The school trustees having done all that was required on their part, and given the teacher the requisite order to receive the amount due to him, would entitle the teacher to be paid if the money were there for that purpose, and it would be a breach of duty in the corporation not to pay. In that case the breach of duty is individually applicable to the teacher, the person who suffers by not being paid.

The charge in this case—namely, not levying a rate—applies to a class of persons, and the question is whether there

is such a breach of duty in such a matter to each individually as gives a right of action. The 21st section of the act enacts that this corporation, being a town, shall be liable to the same obligations as are enacted in respect of townships under the 18th section, and councils of counties under the 27th section. This last section is very plain, that no teacher shall be obliged to wait for the collection of the rate, but the treasurer shall pay in anticipation of it, but still it shews that a rate is to be imposed for the purpose of providing the fund in time or to reimburse the corporation.

The corporation is to impose the rate at the request of the trustees, and it is asserted in this case that the trustees did request it to be done. I have met with no authority shewing that an action can be maintained for not complying with such a request. The plaintiff is not a contractor with the defendants, but has contracted with another corporate body altogether, and therefore no obligation arises on the defendants beyond what grows out of the provisions of the school acts. Those obligations are, I take it, in the first place to comply with the request of the school trustees and levy a rate, and when that has been done, then, secondly, the treasurer shall comply with the orders of the trustees by paying from any moneys in his hands.

The first of these obligations, I take it, must be enforced by mandamus, and *that* I think is the proper remedy, and not an action of this description. It would be very inconvenient if the corporation should be exposed to an action by every individual of a class of persons for breach of duty, when it might be in the power of the corporation to shew that there existed something in the request of the trustees which might be illegal.

It is a pity the plaintiff has been advised to try an experimental action when the other remedy was so plain, and about which there could be no doubt. The best consideration I can bestow upon it leads me to the conclusion this action is not sustainable.

McLEAN, J., concurred.

Rule absolute to arrest judgment.

DARLING ET AL. V. DAVID BELLHOUSE AND WILLIAM BELLHOUSE.

Deeds—Construction—Creation of partnership.

Two deeds of the same date were executed by D. B., one of the defendants, who lived chiefly at Montreal, and by W. B. and H. I., the last two being then in partnership at Hamilton, under the name of B. I. & Co.

The first deed recited that the firm were indebted to D. B. for goods supplied and agency, in £1454 4s. 1d., the time for payment of which he had agreed to enlarge as therein set forth; and they thereby covenanted to furnish him with a yearly balance sheet to shew the state of their business, and that they would pay him the sum due with interest, as follows, namely, £6,000 by instalments specified, and after satisfying that sum that the profits of each year, after deducting expenses and a certain sum for each partner, should be applied towards payment of the balance due. It was provided that said D. B. should until his debt was paid have free access to their books, and although he should have power to enlarge the time for payment of any part of his claim beyond the days specified, yet that in case of default in payment according to the covenant, either of the £6,000 or the balance, from the profits, as set forth, he should be entitled to enforce payment of the whole principal and interest then unpaid.

The second deed recited the indebtedness of the firm to D. B., and the enlargement of the time for payment; and it was thereby agreed that until the final discharge thereof, or until an election by said D. B., of the alternative plans thereafter proposed for the settlement thereof, the said D. B. should act as agent of the firm in the purchase and shipment of goods, &c., and that in consideration thereof, instead of commission, they should pay him £500 a-year. It was then provided that so soon as the capital stock of each of the partners should equal the sum then due to D. B., so that by transferring his claim to the firm he would have an equal third share, then he should be entitled to demand either to be admitted as a partner, or a bonus by way of compensation for such right, and on such demand being made and acceded to his annual salary should cease.

No such election had been exercised, nor was it shewn that the circumstances of the firm had been such as to make it possible.

Held, that D. B. did not become by either deed a partner in the firm.

ACTION on two promissory notes signed William Bellhouse & Company, and on common counts.

Judgment was entered by default against William Bellhouse.

The defendant David Bellhouse pleaded *non fecit* to the notes, and never indebted to the common counts.

At the trial, at Hamilton, before *Robinson*, C. J., it appeared that the two defendants were brothers, the elder, David, being usually resident in Montreal, and in business there, the defendant William residing in Hamilton, in Upper Canada.

Whether David was or was not a partner with William at the time of the promissory notes being made by the

latter in the name of William Bellhouse & Company, or at the time of contracting the debts sued for on the common counts, was the question to be tried.

The notes were both made on the 15th of November, 1858, in the name of William Bellhouse & Company, each being for £75, payable to the plaintiffs, one at three months and the other at six months; and, besides these, the plaintiffs claimed a small account of £11 19s. 5d.

William Bellhouse was called by the plaintiffs, and was the only witness examined at the trial.

He swore that he was in business in Hamilton as a merchant since 1851, and before that time, until lately: that the firm at first was Vennor, Bellhouse & Company, which firm included his brother David Bellhouse, the defendant, but did not include the witness: that in 1849 that firm was dissolved, and a co-partnership was formed of Atkinson and Company, which did not include either the witness or the defendant David: that Atkinson died, and the witness bought his late interest in the business, and came into a new firm in 1851, of Bellhouse, Ireland & Company, which consisted only of the witness and Ireland, and did not include David Bellhouse: that in 1854 Ireland and the witness dissolved partnership, and the witness advertised that he would carry on the business alone under the firm of Bellhouse & Company: that he did continue in business on that footing, and under that name, until he suspended business in March last, and that such was the state of things when these notes were made in the name of William Bellhouse & Company.

He swore most positively that David was not then and never was a partner with him: that he, David, resided always in Montreal, and the whole business of the firms he spoke of had been carried on in Hamilton: that David came up a few times only, and for two years not at all, and never more than once or twice a year, when he might have looked at the books, though the witness never saw him do so: that regular balance sheets were sent to David from time to time, to shew the condition of the affairs of the firm: that David supplied the firm at Hamilton with goods: that

the firm of witness and Ireland up to 1854, and the witness afterwards, remitted to him sums of money on account, and David Bellhouse drew on him for other sums, and sometimes the witness being pushed for money drew upon David Bellhouse: that David had recovered a judgment against him for the amount due, under which the witness' stock-in-trade was sold, and David bought the goods in: that witness' creditors consented to accept a composition of 6s. 3d. in the £, which David agreed to pay: that such as would accept it received it from David and discharged the witness, and others who would not accept it were unpaid. He declared that David never exercised any control over the business of the firm.

This was the substance of the evidence of William Bellhouse in regard to the footing on which he had been in business; and he produced besides a deed, which was executed on the 10th of January, 1852, by himself, Ireland, and David Bellhouse, upon which, as well as upon another deed hereafter mentioned, the plaintiffs relied for making David Bellhouse liable as a partner.

William Bellhouse swore that from the date of that deed the business at Hamilton was carried on according to the provisions of the deed, and no other, with no change, except that in 1854 Ireland retired, and the business was carried on by the witness alone until it ceased in March, 1859.

Another deed was put in, also dated the 10th of January, 1852, and executed by David Bellhouse, William Bellhouse, and Henry W. Ireland, together with a deed of co-partnership between William Bellhouse and Henry W. Ireland, dated the 10th of March, 1851, and referred to in both the other deeds.

It did not appear to the learned Chief Justice at the trial that the deed first executed of the two which bore date on the 10th of January, 1852, (and which was referred to in the other,) had the effect of constituting David Bellhouse a partner of the Hamilton firm of Bellhouse, Ireland & Company, for that it appeared to be merely an agreement by which David Bellhouse, who had made large advances to

the Hamilton firm, agreed to accept payment at certain times and in a certain manner of the debt of £14,000 and upwards, which at that time was due to him by the Hamilton firm.

Provision was made in that deed that £6,000 of that debt should be paid by certain instalments, and as to the residue, £8,000 and upwards, it was agreed in substance that it should be paid as follows: that after a day named the firm should commence to pay off this debt out of the profits of the business which should be realised after William Bellhouse and Ireland had each taken out of the proceeds of the business £300 a-year for his current expenses. The first payment to him of the surplus profits, after such deductions, was to be made on the 1st of May, 1855, and was to include the surplus profits of the year preceding. Particular stipulations were inserted for furnishing David Bellhouse constantly with balance sheets relating to the business done by the firm and the state of its affairs, and he was to have free access at all times to the books and accounts.

David Bellhouse reserved to himself by this deed full power to enlarge the times for payment of any portion of the debt of £14,000, but it was still to be at his option, upon default of making any payment, either of the £6,000, on the days named, or of the residue out of the profits of the business, to enforce payment at once of the whole that should be due to him from the firm.

The other deed executed on the same day by the same three parties, William Bellhouse, Henry W. Ireland, and David Bellhouse, was of a more special character. Among other things, it contained a covenant by David Bellhouse, that in consideration of the £500 to be paid to him annually in lieu of commission, and so long as any portion of his debt of £14,454 4s. 1d. sterling remained unpaid to him, he would faithfully act as agent of the firm, and in the purchase and shipment of goods, and other negotiations and transactions on their behalf, and on their account, "and generally that he, the said David Bellhouse, shall and will use his best exertions, and give his best assistance, in furtherance and for the promotion of the

interest, benefit, and advantage of the said co-partnership firm." The said William Bellhouse and Henry W. Ireland covenanted to pay him the said annual sum of £500 by quarterly payments on the days named, so long as his agency and services should continue, and then followed these provisions:—

"And the said parties to these presents do mutually covenant and agree with each other, that it being the intention of the parties to this agreement, at the time of the execution thereof, that the said agency, and the compensation therefor hereby agreed to be paid, shall cease and determine so soon as the accumulation of capital stock of the said William Bellhouse, and of the said Henry William Ireland, respectively in the said joint concern, business, and copartnership of Bellhouse, Ireland and Company, as exhibited by their annual general account and balance-sheet to be taken on the first day of May in any one year during the subsistence of the said copartnership firm, under their existing articles of copartnership, and under the said articles of agreement executed of even date with these presents, and hereinbefore in that behalf referred to, shall respectively equal in amount the full sum of principal and interest moneys then and at the same time due and owing by the said firm to the said David Bellhouse on account of the said indebtedness of £14,451 4s. 1d., sterling money as aforesaid, so that by a transference of his interests and claims on account of the said debt to the said firm of "Bellhouse, Ireland and Company," the said David Bellhouse would have an equal third share with the said William Bellhouse, and with the said Henry William Ireland, in the capital stock of the said copartnership concern of "Bellhouse, Ireland and Company," then the said David Bellhouse shall be entitled to demand from the said William Bellhouse and Henry William Ireland respectively, and from the said copartnership of "Bellhouse, Ireland and Company," either that he shall be admitted into the said copartnership firm, as one of the partners thereof, with all the privileges, advantages, and profits, and under all the covenants and provisions mentioned and contained in the said articles of copartnership, between the said William Bellhouse and Henry William Ireland, hereinbefore referred to, or under such further agreement for copartnership between the parties hereto as they shall hereafter, and upon the occurrence of such event and demand, execute for that purpose, or that he, the said David Bellhouse, shall be entitled to demand a bonus by way of and in name of com-

pensation for his right to claim an interest and share in the said copartnership concern of "Bellhouse, Ireland and Company," and in discharge of such portion of the said debt so due and owing to him as aforesaid, as shall then remain resting owing to him, the said David Bellhouse, by the said firm of "Bellhouse, Ireland and Company," at the time of such demand, and of the equality in shares and interests of the said Wm. Bellhouse and Henry W. Ireland and David Bellhouse respectively: the amount of such bonus and of such demand, and the times and manner and conditions of payment thereof, to be arranged and settled by arbitrators to be mutually chosen and appointed by the parties hereto respectively, in manner as hereinafter provided for and declared; it being expressly understood and agreed by and between the parties hereto respectively, that in the event of the said David Bellhouse making such alternative demand as is hereinbefore mentioned and provided for, and on the same being acceded to and performed by the said William Bellhouse, and Henry William Ireland, on the terms and in the manner hereinbefore provided for, the said agency of the said David Bellhouse, and the said annual salary and compensation payable therefor by the said William Bellhouse and Henry William Ireland, shall cease and determine, and the rights and interests of the said parties respectively under the said articles of agreement executed of even date with these presents, and under this agreement, shall stand and may be enforced under the award of the said arbitrators to be appointed as hereinafter mentioned and provided for.

And the parties to this agreement further mutually covenant and agree with each other, that when the accumulations of capital stock of the said William Bellhouse and of the said Henry William Ireland, respectively, in the said copartnership firm of "Bellhouse, Ireland and Company," as exhibited by the said annual general account and balance sheet to be taken on the first day of May in each and every year during the existence of the said copartnership firm as hereinbefore mentioned, shall have increased to such an extent as shall make the contributions of the said William Bellhouse and of the said Henry William Ireland respectively equal in amount to the indebtedness of the said firm to the said David Bellhouse for principal and interest moneys aforesaid at the time of such general account and balance sheet being taken and settled as aforesaid, and the said partners of the said copartnership firm neither desiring that the agency of the said David Bellhouse on account of the said firm should continue, nor that the said David Bellhouse

should be assumed as a partner in the said copartnership firm of "Bellhouse, Ireland and Company," then the said William Bellhouse and Henry W. Ireland, and the said copartnership firm, shall be bound, and they hereby covenant, promise and agree, to and with the said David Bellhouse to pay to him, the said David Bellhouse, his executors and administrators, the whole amount of the principal moneys and interest then and at the time of taking such general account and balance sheet due and owing to him, the said David Bellhouse, on account of their said indebtedness to him, and further to pay to him, the said David Bellhouse, his executors and administrators, such an amount by way of compensation and bonus, in lieu of his right to claim an interest and share in the said copartnership firm, as the said arbitrators hereinbefore referred to, and for whose appointment provision is hereinafter made, shall hereafter settle and determine, the amount of such indebtedness, and of such compensation or bonus, to be paid in such manner and form, and at such times, as the said arbitrators shall award, by a proper writing under their hands for that purpose.

Then followed the provision for arbitration, in case of dispute, with which the deed concluded.

The jury gave a verdict for the plaintiff for £166 8s. 8d., and leave was reserved to the defendant David to move for a nonsuit, if on the evidence he could not be held to have been a partner.

Craigie obtained a rule *nisi* according to the leave reserved.

R. Martin shewed cause, and cited *Beckham v. Drake*, 9 M. & W. 79; *Chitty's Precedents* 217; *Chy. Plg.* I. 299; *Pegg v. Stead*, 9 C. & P. 636; *Shillcock v. Passman*, 7 C. & P. 289; *Gwynne v. Sharpe*; 1 Car. & Marsh. 532; *Chalmers v. Shackell*, 6 C. & P. 475; *Fradley v. Fradley*, 8 C. & P. 572; *Jordan v. Smith*, 17 U. C. R. 590; *Peacock v. Peacock*, 2 Camp. 45; *Hickman v. Cox*, 18 C. B. 617; S. C., 27 L. J. C. B. 129; *Janes v. Whitbread*, 11 C. B. 406; *Barry v. Nesham*, 3 C. B. 641, 647, 657; *Grace v. Smith*, 2 W. Bl. 999; *Coope v. Eyre*, 1 H. Bl. 43; *Langdale, Ex parte*, 18 Ves. 301; S. C. 2 Rose 144; *Hamper, Ex parte*, 17 Ves. 404, 412; *Watson, Ex parte*, 19 Ves. 461; *Bond v. Pittard*, 3 M. & W. 360; *Peel v. Thomas*, 15 C. B. 719; *Owen v. Body*, 5 A & E. 31, S. C. 6 N. & M. 448.

McLennan supported the rule, citing *Hallifax v. Lyle*, 3 Ex. 446 ; *Jones v. Corbett*, 2 Q. B. 828 ; *Gourlay v. Gunn*, 5 U. C. R., 566 ; *Heyhoe v. Burge*, 9 C. B., 431 ; *Pott v. Eyton*, 3 C. B., 32 ; *Story on Partnership*, Sec. 66 ; *Sm. Merc. L.*, 22, 23.

ROBINSON, C. J., delivered the judgment of the court.

As to the first deed, which contains the provisions for the payment of the debt, or a large portion of it, out of the profits of the firm, we apprehend that deed of itself did not constitute David Bellhouse a partner in the Hamilton firm, and that there was nothing in the *vivâ voce* evidence which added to it would authorise us to infer partnership, though we might have strong impressions that there were other things understood, which if disclosed would shew him to have been a partner.

David Bellhouse, being a brother of William Bellhouse, and having been long transacting business with him upon some footing, might very possibly be willing to shew him so much consideration as to wait for a large portion of his debt until the profits of the firm might afford the means of paying it, and if by that deed he had in so many words agreed to take his chance of ever being paid the last £8000 of the sum *out of the profits of the Hamilton business*, we do not consider that such an agreement could make him a partner, or fix him with the liability of a partner as regarded third parties, for by this deed he was not to receive the profits as profits, but merely consented to look to them as a fund for payment of his debt, leaving their stock untouched.

It must all therefore turn, we think, upon the effect of the other deed of the 10th of January, 1852, between the same parties. Then did that deed make David Bellhouse a partner in the firm at Hamilton ? We have only to look at the deed itself, we think, for determining that. If they were partners in consequence of that deed, it would seem that it must be because it was the inherent effect of the deed, for nothing is shewn to have taken place afterwards that could have given it a new operation. According to William Bellhouse's account of the matter, and there is no evidence to the con-

trary, he and Ireland continued in partnership till 1854, when Ireland left the firm, and then he, William Bellhouse, continued in business alone under the name of Bellhouse and Company, till he suspended business in March, 1859. The notes sued on were made in November, 1858. The firm, as he represented, was any thing but prosperous, and it does not appear that the option of becoming a partner was at any time exercised by David Bellhouse, or that the circumstances were such as admitted of such an option being made according to the terms of the agreement. The question then is, whether it can be properly determined that the terms of the agreement referred to,—we mean the second agreement, executed on the 10th of January, 1852,—made David Bellhouse a partner with his brother and Ireland, by the fact alone of his having executed that deed.

Of course it could not, if the only effect was to give to him an opportunity of becoming at a future period, if he pleased, a sharer with them of the profits and losses of the trade to be carried on after he declared his wish to be accepted as a partner.

Then does the deed do more? It is very possible that the parties understood among themselves that it should have an effect which is not apparent on the face of it, but we cannot act upon a mere surmise of that kind; and having attentively considered the deed, we are surprised to find it so entirely wanting as we think it is in any thing that can be reasonably construed into a stipulation that David Bellhouse may have an option to share in *antecedent* profits, whenever and if ever the time should arrive when according to the terms of the deed he would be at liberty to enter into the copartnership. We see nothing retrospective in the deed in that respect,—nothing that would reach back, as we expected to find it would, from the arguments that were founded on that deed. In truth no such partnership was ever formed, according to the only evidence which we have; but if the deed had been so framed that it could be said to reserve to David Bellhouse the profits, at his election, that had been made in the business since the 10th of January, 1852, and which in the meantime were to be kept in reserve, the case would then have been a very different one to deal with.

Whatever may have been the private understanding between the two brothers, if there was any, this latter deed, of the 10th of January, 1852, supplies no proof, in our opinion, of David Bellhouse being a partner at the time of these notes being made, or indeed at any time; and if there is any room for contending that there was in fact a partnership, it is only under the first deed, as it appears to us, that there could be any hope of making out that point.

There are dicta of some of the judges in the cases cited by Mr. Martin, that seem to support what he contended for, but they do not go the length of the present case, and the current of authority, as well as the reason of the thing, is the other way.

The case of *Grace v. Smith*, (2 W. Bl. 998,) seems to us to put the question on the true ground: that is, whether the party has agreed to share the profits of the trade, or whether he has only relied on those profits as a fund for payment: "a distinction not more nice," Lord Chief Justice De Grey said, "than usually occurs in questions of trade or usury."

It must be considered that before David Bellhouse agreed to receive his debt by annual payments out of the profits of the business to be carried on by the Hamilton firm, he had it in his option, if he had pleased, to enforce his claim at any time by taking the stock in trade in execution, which the other persons dealing with the firm might continue to furnish, or had furnished; and that when he agreed to look only to the profits, he consented in effect to let the creditors who had furnished goods be paid first, since there could be no profits till the stock was paid for: yet there is force in the observation of *Crompton, J.*, in *Hickman v. Cox*, (3 C. B. N. S. 536,) "The next time a balance is struck there may be a loss," which the general creditors of the firm would not find compensated if there is a specific lien upon the profits of more favourable years.

According to the best judgment we can form, however, we think we cannot hold David Bellhouse to be liable as a partner, and that the rule must therefore be made absolute for a nonsuit.

Rule absolute.

THE CORPORATION OF THE VILLAGE OF INGERSOLL V.
CHADWICK.

Action against treasurer for money not paid over—Evidence of order to pay out moneys—Verbal order—Estoppel.

In an action by a municipal corporation against their treasurer on his bond, charging him with not having paid over moneys received, it appeared that the Corporation had a contract with one E. to build bridges for them: E. wanting money got the reeve to endorse his note for \$600, which was discounted by defendant at the Niagara District Bank, of which he was agent, as well as treasurer of the municipality. A few days after another note for \$400 made by E. and endorsed by other persons, one a member of the Corporation, was discounted at the same bank. When these notes were about to fall due a meeting of the council took place, at which defendant was present, and the reeve swore that it was then understood that the council should assume these two notes, and he thought the defendant was authorised to charge them both to the Corporation; but other councillors examined did not agree with the reeve in their recollection of what took place; and the only resolution or minute in writing was that the council should give their note for \$700, to be used in the Niagara District Bank by defendant. This note was accordingly made by the reeve, and endorsed by the other members.

Held, that under these facts, the treasurer had no right to charge the council with the remaining \$300.

In an account rendered to the council by defendant this \$1,000 was charged as paid to Ellsworth, and it was asserted that they had made subsequent payments to him, assuming the account to be correct. The facts did not shew this to be the case, but *Seemle*, that the council would not have been bound by omitting to notice or object to this item, whatever might be the effect if the account had been regularly audited.

A treasurer of a municipality should not be permitted to act also as agent of a bank.

The first count of the declaration was upon a bond, given by the defendant as treasurer of the Corporation, conditioned for the payment by the defendant to the order of the reeve of the municipality, of all moneys put into the defendant's hands by virtue of any by-law, resolution, or other cause or causes emanating from the municipal council; and the declaration charged the defendant with not paying over to the order of the reeve a large sum of money received by him, to wit £1,000.

Second count, for money received by the defendant to the use of the plaintiffs, and upon an account stated.

Pleas:—1. To the first count, *non est factum*.

2. To the first count, that the defendant did pay over to the order of the reeve all moneys which came into his hands.

3. That while the defendant was such treasurer, and held in his hands said moneys, the said Corporation became

and were indebted to one William Ellsworth in a large sum of money, to wit, \$4,317.50, for work and labour done by the said Ellsworth for the said Corporation, and thereupon, at a meeting of the municipal council of said Corporation duly held, the reeve of the said Corporation, in the presence and hearing of the said council, and without objection from the said councillors at such meeting, and with the verbal assent of such councillors, or of a majority of them, gave the defendant as such treasurer verbal orders to pay said William Ellsworth the sum of, to wit, £250 on account of and as a part of said debt: that the defendant did then thereupon pay the said William Ellsworth such sum of money: that afterwards the said council ordered the defendant as such treasurer to render to the said council an account of moneys received and paid out by him as such treasurer for and on account of the said Corporation: that in pursuance of such orders the defendant did make and render to said council such account, and did therein charge the said Corporation with the said money so paid by the defendant to the said William Ellsworth: that such account being so rendered to said council, and said council being aware of the same, and its contents, and of the payment of the said moneys as aforesaid, did charge the said money so paid by the defendant to the said Ellsworth against him, the said William Ellsworth, as a credit to the said Corporation on account of said debt; and the said council afterwards, by a resolution thereof in writing duly made, on, to wit, the 11th of June, 1858, did direct the reeve of said municipality to pay the said William Ellsworth the sum of \$112.35 on account of said debt so due to said William Ellsworth by the said Corporation, after charging against him and crediting to the said Corporation the said sum so paid by the defendant as aforesaid; and in pursuance of such resolution of said council the said reeve, to wit, John Galliford, Esquire, did afterwards duly make an order in writing, directed to the defendant as such treasurer, whereby he required the defendant to pay the said William Ellsworth the said sum of \$112.35 so ordered to be paid as last aforesaid, and which the defendant did then accordingly pay to said William

Ellsworth out of the moneys of the said Corporation. And the defendant further says that the said sum of money so in the first count alleged to have been paid into the hands of the defendant, and not paid over by him as aforesaid, is the said sum of money so paid by the defendant to the said William Ellsworth as aforesaid, and not other or different moneys; and that all the matters and things hereinbefore mentioned happened before the commencement of this suit, and before an act of the parliament of Canada made and passed in a certain session thereof held in the 22nd year of the reign of Queen Victoria, intituled "An act respecting the municipal institutions of Upper Canada," had come into force.

4. To the second count, not indebted.

5. To the second count, on equitable grounds, the same as the third plea to the first count, except that the plea concluded by alleging "that the said money so paid to the said William Ellsworth as first aforesaid by the defendant, is the said sum of money in the second count and in the introductory part of this plea mentioned, and not other or different money," and that the matters in this plea mentioned happened, &c., (as in the 3rd plea.)

6. To the second count, payment and satisfaction of plaintiffs' claim.

The plaintiffs, besides taking issue on all the pleas, demurred to the third and fifth pleas.

The issues were tried at Woodstock, before *Burns, J.*, the demurrer not then having been argued. The facts proved were as follow:—The corporation had given a contract to Ellsworth to build some bridges, and were indebted to him on account thereof, or rather would owe him when the work should be completed. Ellsworth wanted the corporation to advance him money in anticipation, but they refused to do so. The defendant, besides being treasurer of the corporation, was agent for the Niagara District Bank, and as such kept an office of discount. Ellsworth, on the 22nd of February, 1858, made a note in favour of John Galiford, the reeve of the municipality, for \$600, payable in a month, and endorsed by Galiford. Upon this note Ellsworth obtained the money

from the defendant as such bank agent. On the 25th of February, 1858, Ellsworth made another note, for \$400, also payable in a month, and this note was endorsed by C. H. Brown and Thomas Brown, and he obtained the money from the defendant. Thomas Brown was also a councillor, and a member of the finance committee of the corporation. As these two notes were about falling due, in March, Ellsworth was pressing the council for money. The council met on the 23rd of March, 1858. Galiford, the reeve, swore that the defendant was present, and also Ellsworth, and he said it was understood that the council should assume these two notes, and that he considered that the defendant had authority to charge them to the corporation. He said he stated to the council that he was endorser upon one of the notes, and wanted the council to do something about the matter to relieve him. After talking the matter over, he said it was understood the council should assume these two notes, though there was no resolution in writing to that effect, and no authority given in writing to the defendant to charge these notes to the corporation. The council resolved to give their note for \$700 to be used in the Niagara District Bank by the defendant, and then he, the reeve, considered the defendant had a right to charge the whole \$1000, the two notes, to the corporation. Two other members of the council were examined, and they both stated that it was usual to have a great deal of conversation, but what was finally resolved upon was always reduced to writing and entered in the minute book. They both swore that they did not understand that the council were in any way assuming the amount of the two notes, and one of them swore that he did not know that the reeve and Brown were endorsers on the notes until long afterwards. One of them stated that he recollected that at the time the resolution was come to about raising \$700 to pay Ellsworth, it was then spoken of that they must not go too far, for fear that Ellsworth would be overpaid. The clerk of the municipality proved that there was nothing done by the council beyond what appeared in the minute book.

The minute book shewed that at the meeting in question

all that was done in relation to the matter were these two resolutions :

1. Moved by Thomas Brown, seconded by H. Crotly, that William Ellsworth be allowed by this council the sum of £50 as damages for delay of payment of contract on bridge.—*Carried.*

2. Moved by Thomas Brown, seconded by H. Crotly, that a note be drawn by this council in favour of the Niagara District Bank for \$700, in payment of part of Mr. William Ellsworth's estimate on Thames street bridge.—*Carried.*

No more money was paid to Ellsworth after the meeting in March, 1858. It seemed that he, by the defendant charging the corporation with the \$1000, had then been over-paid \$300, but charging Ellsworth with the \$700 authorised by the foregoing resolution, then the defendant was deficient just the sum of \$300 in making his account with the corporation balance.

In accordance with the resolution of the 23rd of March, the reeve made his promissory note for \$700, and this was endorsed by all the other members of the council, and furnished to the defendant for discount. This was two days before one of the two notes in question would fall due, and five days before the other would become due.

On the 15th of April the council, by resolution, called upon the defendant to furnish them with a statement of all moneys paid to contractors. A statement of moneys paid was furnished, and entries made in the minute book of the clerk of the council. That book was produced in court, and all the items of Ellsworth's account was entered in the hand-writing of the clerk, except the \$1000 said to be assumed, and the entry with respect to that was in the hand-writing of some other person. The clerk said he did not know whose writing it was, nor when nor how the entry came to be made in his book.

The resolution of the 11th of June, 1858, referred to in the defendant's plea was proved, and it was this:—"Also, that an order be drawn on the treasurer for the sum of \$112 35, in favour of William Ellsworth, in payment of bridge contract.—*Carried.*"

The order was given for this amount by the reeve

on the 4th of August, 1858. The clerk proved that that sum had been assumed by the council, and agreed to be paid on account of Ellsworth, some time before the two notes fell due to be paid to Mr. Brown. The resolution of the 11th June, and the order for payment, were made afterwards to carry out what the council had previously agreed to do, and the money was paid to Brown and not to Ellsworth, and the order for it was to pay Ellsworth or bearer. The same thing occurred with respect to another payment of £83 3s. 7d., which the defendant desired to use as shewing acquiescence in the council after he had charged the \$1000 to the corporation. The order for this was drawn on the 9th of May, 1858, and the clerk proved that it had been assumed by the council on account of Ellsworth, in the month of January previous.

After the election of the new council for 1859, when the previous year's accounts were being audited, it was found the defendant had no voucher for the \$300. The reeve said he spoke to the defendant about it, for they found it was connected with Ellsworth's account. The defendant told him that he had attended the meeting of the 23rd of March, 1858, for the purpose of getting the council to assume the amount of the two notes, but finding himself cold he did not remain until the council decided on the matter, but went away, thinking that all would be right, and acting upon that charged the plaintiffs in his accounts with those notes.

It was admitted on the part of the defence that unless the evidence excused the defendant from accounting to the plaintiffs for that sum of \$300, the verdict must be against him to that extent.

The learned judge told the jury that in his opinion the evidence did not sustain the pleas in fact, and that they were not proved. That the defendant had not paid the \$300 on any debt owing to Ellsworth by the corporation, for at that time, by giving the note of the members of the corporation for \$700 to raise money for him, Ellsworth was fully paid what the corporation owed him. The \$300 was in fact paid by the defendant on a debt which Ellsworth owed the bank, and what the defendant wanted the corporation to do was to assume the payment of that debt, but there

was no evidence which could in any way bind the corporation to pay the bank debt, nor any reason why they should assume it.

The jury found a verdict for the plaintiff, for the \$300 and interest, in all £82 10s.

Beard obtained a rule to shew cause why there should not be a new trial for misdirection, and on the ground that the verdict was against the evidence, or the weight of evidence; or why the judgment should not be arrested, on the ground that so much of the the second count as related to an account stated was bad in substance, and the damages had been assessed generally. He cited, *Renter v. The Electric Telegraph Co.*, 6 E. & B. 341; *Perry v. Attwood*, ib. 695; *Bill v. Darenth Valley R. W. Co.*, 1 H. & N. 304; *Darlington v. Pritchard*, 4 M. & Gr. 783; *Coles v. The Bank of England*, 10 A. & E. 437.

D. G. Miller and *McMichael* shewed cause, and cited *Grant on Corporations*, 546-7; *Dance v. Girdler*, 1 New Rep. 34; *Mayor, &c., of Ludlow v. Charlton*, 6 M. & W. 815; *Edwards v. The Grand Junction R. W. Co.*, 1 M. & Cr. 650; *Regina v. Town Council of Lichfield*, 4 Q. B. 893; *Taylor v. Dulwich Hospital*, 1 P. Wms. 655.

ROBINSON, C. J., delivered the judgment of the court.

When the bond was given the statute 16 Vic., ch. 182, was yet in force, which required (sec. 76) that the bond should be "conditioned for the faithful performance of the duties of such treasurer." This bond was not taken with a condition exactly conforming to the statute, the condition not being so comprehensive as the act directed, but so far as any thing is expressed it is not inconsistent with the act.

The statute at present in force (Con. Stats. U. C., ch. 54, sec. 159,) is more explicit than the former act, and requires the condition to be that if the treasurer shall faithfully perform his duties, and especially shall duly account for and pay over all moneys which may come into his hands, &c. But no question arises upon this diversity, for it is clear that the bond given must be construed with reference to the law

in force at the time, and there is no room for doubt that whatever money the treasurer received as treasurer he was bound duly to pay over and account for.

The special pleas that he has put in are demurred to, but we have to determine upon this rule not their sufficiency, but whether the evidence proved them to be true. It is very clear that the pleas were not proved, and that the defendant had no warrant for saying that he had even the implied order of the municipal council to pay to Ellsworth the \$300 which is in dispute: that is, the excess of \$1,000, which he did pay to him, above the \$700 which he had the sanction of the council for paying. It is evident that the defendant acting, which it is to be regretted that any treasurer should be permitted to do, in the double capacity of treasurer for the municipality and agent of a bank, went beyond his authority in the former capacity, in order to sustain and make sure what he had done as bank agent, at the instance, perhaps, or at least with the privity, of the reeve, but not with the knowledge or assent of the council as a body, and the treasurer must have known that he cannot lawfully pay out moneys unless in obedience to some act of parliament, or by proper authority of the council. If a treasurer chooses to act upon the construction which he puts upon, or the inferences which he draws from, mere conversations among the members of the council which may take place in his presence, he does so at his own risk, and he should be aware that no loose conversations of any one or more of the members can form a voucher that will acquit him for paying out public money.

There is something strange in the evidence of an entry in the minute book of their proceedings being in a different hand-writing from the rest of the minute, not made by the clerk, nor by any one who had his authority for making it.

The pleas were certainly not proved, and the verdict for the plaintiffs must stand, for it appears from the evidence, when the facts are attended to, that the payment of \$112.35 authorised by the council to be made to Ellsworth, cannot be held to have been a recognition and sanction by them of the charge in the treasurer's accounts against the corporation of \$1,000 as if paid to Ellsworth under their authority.

And if there had been no peculiar circumstances, such as we allude to, we should still hesitate to hold the council bound by their omission to object to or to notice any item which might be inserted by the treasurer in a long account placed before them, whatever might be the effect of the account having undergone a regular audit.

Rule discharged.

THE SAME CASE.

Payments by treasurer on verbal order—Action by council of succeeding year—Estoppel—Pleading—Equitable defence.

The first count was upon the bond given by the treasurer, alleging moneys received and not paid over, the second count for money had and received. Defendant pleaded, on equitable grounds, to the first count, that while he was treasurer the corporation owed one E. a large sum of money, and thereupon, at a meeting of the council duly held, the reeve, in the presence and hearing of the council, and without objection, and with the verbal assent of the councillors, or a majority of them, gave the defendant, as treasurer, verbal orders to pay E. £250 on account of said debt, which defendant thereupon paid: that afterwards the council ordered defendant to render them an account of moneys paid and received by him for the Corporation, which he did, charging the Corporation in it with the money so paid to E. : that said council, being aware of such account and of said payment, charged the said sum against E., and afterwards by resolution directed the reeve to pay E. \$112.35 on account of their debt due to him, after crediting themselves with such payment; and the reeve thereupon required defendant in writing to pay said \$112.35, which defendant accordingly paid; and defendant alleged that the money claimed in said count as received by him and not paid over was the sum so paid by him to said E. as aforesaid.

To the second count the same facts were pleaded, but the allegation at the end of this plea was, that the money so paid to E. as first aforesaid was the money in the count and in the introductory part of this plea mentioned.

Held, on demurrer, first plea good, being an averment that the money sued for was the \$112.35 paid by defendant on the resolution. Second plea bad, for the money there alleged to be sued for was the \$1,000, for the payment of which no sufficient authority was shewn.

Quære, this action being by the council of the year after that in which the payment pleaded was made, whether the facts would have afforded any defence against the council who thus sanctioned the payment.

The plaintiffs, besides taking issue, demurred to the third and fifth pleas, assigning as grounds of demurrer "that there is nothing in said pleas to shew that the plaintiffs are legally or equitably bound to carry out the arrangement made by said reeve, or that said reeve and council had the legal right to order the money to be paid as therein alleged, or

that the said defendant had the right to pay the said moneys as alleged." The pleas are set out, ante page 278-280.

The demurrer and rule *nisi* were argued together.

ROBINSON, C. J., delivered the judgment of the court.

This defendant having failed to prove the truth of the pleas which have been demurred to, our judgment on the demurrer is of no further consequence than as regards the costs.

The third plea, demurred to, in effect and by reasonable intendment avers that the money which the defendant is charged in the first count with not having duly paid over, is the \$112.35 which is alleged in the plea to have been paid to Ellsworth in obedience to a resolution of the council. We think that plea is sufficient.

In the fifth plea the defendant avers that the money which he is now sued for in the second count as not having duly paid over, is the sum of \$1,000 which he paid to Ellsworth in the manner and upon the authority set out in the fifth plea: that is, upon the verbal order of the reeve, given in the hearing and with the assent of the council.

The count to which this plea is an answer is the common count for money had and received, and taking, as we must upon demurrer, the facts stated in the plea to be true, we think the same council—that is, the council of the same year—could not recover probably on that count from the treasurer a sum which they admit him to have paid by their sanction and authority, though not given with proper form, and which moreover they admit that they took credit for to the council upon their contract made with Ellsworth, as a payment made to him.

According to the statement in this plea these transactions took place in 1858, and this action is brought in 1859, and so must have been brought by another municipal council—that is, composed of other members—who would not, we think, be estopped by any act *in pais* of a former council, if indeed any estoppel of the kind could be set up against an act of parliament, and we take it that under the statute then in force no money could be paid out so as to acquit the

treasurer, (unless, perhaps, trifling payments to meet contingencies constantly occurring,) except upon the collective resolution of the council. In our opinion this plea is not sufficient, for if it is no answer to an action by the Corporation that a municipal council of a former year, or the reeve of that council, verbally ordered the moneys claimed to be paid out, neither can it constitute an equitable defence against parties who did not concur in the irregularity.

Judgment for defendant on demurrer
to third plea, and for plaintiffs on
demurrer to fourth plea.

SHAW AND NEAL AND THE CORPORATION OF THE TOWNSHIP
OF MANVERS.

School sections—Alteration—Notice—By-laws.

On the 19th of December, 1857, a township council passed a by-law creating a new school section, called No. 9, out of sections 13 and 8, and defining what should thereafter constitute section 13. Notice was given of the intention to pass this by-law, but it was not done at the request of the freeholders and householders expressed at a public meeting; on the contrary, the change made appeared to be opposed to the wishes of a majority of the inhabitants. On the 8th of May, 1858, a by-law repealing it was passed, of which no notice had been given to the parties interested, thus restoring the sections to their former position, and on the 10th of September, 1859, another by-law was passed assessing the section 13 as it originally stood, for the expenses of building a school house, &c.

Held, that the by-law of May, 1858, must be quashed, for the previous by-law was legal, and a by-law repealing it, which would in effect make an alteration of school sections, could not be passed without notice to those interested; and that the by-law levying a rate on section 13 as it stood before 1857 must necessarily be quashed also, for that would include part of what was section 9.

Hodgins obtained a rule *nisi* to quash two by-laws, under the following circumstances :

On the 19th of December, 1857, the township council passed a by-law altering some of the school sections of the township. The first clause created a new school section to be carved out of sections numbers 13 and 8, and the new section was called section number 9, and it was defined by boundaries.

The second clause defined the portion of the township which should thereafter compose section number 13.

When this by-law was passed the relator, Shaw, was a

member of the township council. It seemed that the change was opposed by various inhabitants of the then section, but Shaw proposed the by-law in council, and one other of the councillors voted with him, one voted against it, the reeve did not vote, and the fifth councillor was not present. Notice was given of the intention to propose this by-law. The by-law came into operation on the 25th of December, 1857.

On the 8th of May, 1858, the township council repealed this by-law, the effect of which, if legally done, was to restore matters to the former footing.

At the annual school election of trustees in 1858, it seemed the majority of the electors considered that the by-law of 1857 did not legally constitute the section number 13, and as Shaw's term of office as trustee expired by effluxion of time, the majority elected a person of the name of Sanderson in his place. The local superintendent attended that meeting. When the election was held for 1859 the other relator, Neal, joined with Scott, another of the trustees, in calling the meeting to elect a new trustee in the place of Neal, whose term of office expired, and on that occasion one McQuaid was elected in Neal's place. The parties, that is, the majority, were then treating the school section as upon the footing upon which it had stood previous to the by-law of 1857.

It appeared that a school-house had been built since the repeal of the by-law altering the section, and on the 10th of September, 1859, the township council passed a by-law assessing the section in \$565, to pay the expenses of building the school house, and for paying the teacher's salary.

The present application was made on the part of the relators, Shaw and Neal, to quash these two by-laws of the 8th of May, 1858, and the 10th of September, 1859, in order that the by-law of the 19th of December, 1857, altering the sections might remain in force. The grounds upon which the application was made were as follows:

With regard to the first of these by-laws—1. That the by-law was passed without notice to the trustees of school sections 8 and 13, and other parties affected thereby, and without the request of a majority of the freeholders and householders of the school sections to be affected by it.

2. That the by-law does not set out or recite any such notice or request as the condition precedent for the passing thereof by said council.

3. That no notice of the passing of the said by-law was given by the said council to the trustees of the school sections affected thereby, nor to the local superintendent of common schools, either immediately after the passing thereof or on or before the 25th of December, 1858.

Then, with regard to the second of the by-laws complained of, the objections were :

1. That the school section on which the rate was levied was not legally formed.

2. That the by-law was passed without notice to the trustees, and freeholders and householders of the school section concerned.

3. That the said by-law was passed without the previous request of the majority of the freeholders and householders of said school section, as expressed at a lawful annual or special meeting thereof duly called by the trustees for considering the levying of the rate mentioned in the by-law and the application thereof.

4. That the by-law was passed without the previous request of the lawful trustees of said school section, duly made to the council on behalf of a majority of the freeholders and householders, expressed at a public meeting for the purpose of authorising said rate and application therefor.

5. That the by-law does not set out or recite that it was passed at the request of the trustees of the section, duly made to such council on behalf of a majority of the freeholders and householders therein, expressed at a public meeting called by the said trustees for the purpose of authorising said rate.

6. That the by-law was not applied for by the lawful trustees of said section, at or before the meeting of the council held in August, 1859.

7. That the by-law levies a rate on behalf of an illegal contract for building the school house mentioned therein, said contract having been previously made with a member of the corporation of trustees, and also levies a rate for law costs, for which the trustee corporation is not responsible.

The application was supported by the affidavits of the relators and others. The relators swore that they as trustees, which they claimed to be as legally representing the altered school section, received no notice whatever of the consideration or passing of the by-law of the 8th of May, 1858, and that they were informed, and believed, that none of the parties affected by or interested in the effect of that repealing by-law were notified or informed of the intention or the proceedings of the council in passing it, nor did the council enquire or satisfy itself whether any notice had been given to the parties concerned, but that the council did it of their own accord. They further said, that the clerk of the council did not notify the trustees of it, or the local superintendent, and that it was only lately the inhabitants of the section knew that such a by-law was passed.

The by-law of the 10th of September, 1859, was requested to be passed by Sanderson and McQuaid, trustees of school section number 13, which they contended they represented. With respect to this by-law the relators swore that those persons who asked the council to pass the by-law had no authority to do so, because they were wrongfully elected, and had not the true seal of the corporation, which the relators contended remained in their hands. They said they were not aware of any meeting having been called to consider the levying of a rate, and they believed none was called: that treating the relators as the lawful corporation of trustees, the council had full notice that they had not requested a rate to be levied, and they denied they ever requested the council to pass the latter by-law. The relators then further stated, that Sanderson was the party who held the contract for the building of the school house mentioned in the by-law, and for which the rate was levied, and further, that they were informed and believed that the costs of a division court suit paid by one Scott were included in the rate.

The relators were supported by the affidavits of three other persons, inhabitants of the section, with regard to what they had stated.

M. R. Vankoughnet shewed cause.

The application was opposed upon an affidavit of Scott, who was the reeve for the present year, and who stated that he was a councillor for both the years 1858 and 1859, and was one of the school trustees in 1857, at the time the then council made the alteration. He said that there never was any public meeting of the freeholders and householders for the purpose of petitioning the council to make an alteration in the sections. A notice was given, however, that the council would be asked to make the alteration, and in consequence of that he appeared at the meeting of the 19th of December, 1857, to oppose the alteration, and he produced the petition of twenty-six of the inhabitants opposing the alteration. Neal, one of the trustees, a relator now, appeared and produced a petition of thirteen of the inhabitants in favour of the alteration. At that time the other relator, Shaw, was both a trustee and councillor, and he supported the alteration. Scott further stated that it was found the alteration worked injuriously, and broke up the school, and upon taking legal advice he was informed that the by-law altering the sections was itself illegal, and unless it were repealed steps might be taken to quash it. This was communicated to the council, and the members of the council then had an interview with Shaw, and Shaw was informed that if he would give security against the costs the council would allow the by-law of the 19th December, 1857, to be tested, but this Shaw refused to do, whereupon, to avoid trouble and expense to the township, the council, as Scott stated, on the 8th of May, 1858, repealed the by-law of December, 1857.

This affidavit of Scott was supported by affidavits of six other persons, inhabitants of the section 13, all denying that any meeting was ever called or held for the purpose of considering the expediency of any alteration. All these persons said that they were opposed to it, and that the majority of the inhabitants were opposed to it: that the effect of the alteration was to destroy the section, and that it would be impossible to maintain a school in it.

BURNS, J., delivered the judgment of the court.

With respect to the ground upon which the defendants

attack the by-law of 1857, as a reason why it might be repealed by the township council—namely, that no public meeting was held of the freeholders and householders of the inhabitants, or any request made to the council expressed at any meeting for the purpose, to make an alteration in the sections, this court has already decided in *Ness and The Municipality of Saltfleet*, and *Ley and The Municipality of Clarke*, (13 U. C. R. 408 & 433,) that it is not necessary to confer power upon the council to alter school sections that it should first be asked to do so by that mode of request. All that is necessary, in case of an alteration being asked for, is that all parties affected by the alteration shall have been duly notified of the intended step or alteration. Notice was given, and both sides, those favourable to the alteration and those opposed to it, were present and were heard, but the council notwithstanding passed the by-law making the alteration. Why then it should be supposed in May, 1858, that the by-law was illegal, it is difficult to conceive, unless it be that the parties thought the council had no power to pass it against the wish of the majority of the inhabitants of the school section. According to the affidavits and petitions *pro* and *con*, there seems to be little doubt the by-law was passed contrary to the wishes of a majority of the inhabitants. Nevertheless it was a legal by-law, and it could only be got rid of again upon legal grounds.

This latter point is involved in the attack made by the relators upon the by-law of the 8th of May, 1858, and the question is whether that by-law has been legally passed without notice. It is not pretended that the ratepayers or inhabitants generally of the section 13, or the new section created by the by-law of 1857, were notified or had any notice of an intention to pass such a measure. It seems that Shaw, one of the relators, was aware on the 7th of May that such a measure was before the council, for he was then asked to give the council a guarantee against costs, and they would allow the by-law to stand which was then still in force, but this he refused to do. It appears there was a division among the inhabitants immediately after the passing of the by-law of 1857, and each division elected its own set of trustees, or

rather another trustee to fill up a vacancy. There seems to be little doubt that in the contest going on between the two parties the one favourable to no change being made in the section was the most numerous.

The question, however, is not which was the most numerous party electing the trustee in 1858, or which of them had most friends in the council in May, 1858, but the question is whether the council had any power to repeal the previous by-law without the parties interested in it being notified of the alteration the repeal would effect.

The repealing of the previous by-law undoubtedly was another alteration in the section, and that could not go into operation until the 25th of December, 1858. The 4th subsection of section 18 of the school act of 1850, enacts that no application for an alteration shall be entertained unless it shall clearly appear that all parties affected by such alteration have been duly notified of the intended application. The giving of notice is a condition precedent to the council entertaining the application, and this provision must apply as well to the repeal of a law which would of itself constitute an alteration, as of a notice in the first case of making a change.

For this reason the by-law of the 8th of May, 1858, must be quashed.

Then comes the next by-law, levying the rate. If the by-law upon which that is founded be quashed it is impossible this can stand. The by-law of the 8th of May, 1858, being removed out of the way, then that of December, 1857, remains in force, and by that a new section, number 9, was created out of sections 13 and 8. The by-law for levying the rate, however, is for section 13 as it formerly stood, and under that those who would be in the new section 9 are called on to pay, which cannot be right so long as number 9 remains.

Without entering into the points raised against the last by-law which have been taken, it is sufficient to say that in removing the by-law of the 8th of May, 1858, the other must go with it.

The rule should therefore be made absolute with costs.

Rule absolute.

TUCKER V. ROSS ET AL.

Interpleader—Sale—Execution.

On an interpleader issue, it appeared that A. owned the wheat in question, which was stored with S. On the 8th of October he sold it to the plaintiff, and on the 10th gave him an order on S. for it, which S. accepted, and on the 11th the plaintiff paid A. the purchase money. On the 10th the sheriff went to seize the wheat under an execution against A., at the suit of one N., which had been in his hands since August, but S. told him that A. had no wheat there. On the 11th, however, the sheriff returned and seized, and on the 14th, the execution at the suit of defendants was placed in his hands.

Held, that the plaintiff was clearly entitled under his purchase as against the defendants' execution.

INTERPLEADER issue, to try whether certain goods were the property of the plaintiff on the 14th of October, 1859, being the day on which the defendants' execution against Allan & Newcome was placed in the hands of the sheriff of Northumberland and Durham.

At the trial, at Toronto, before *Burns, J.*, the facts proved were these:—Allan & Newcome carried on business at the village of Orono, and among other business dealt in purchasing wheat and converting it into flour for Montreal. Previous to the 10th of October they had purchased 698 bushels of wheat, which was stored at the mill of one Squair, in the township of Clarke, who was to manufacture the same into flour for them. Before this time, however, Mrs. Newcome, the mother of the partner Newcome, had lent the firm a considerable sum of money, for which she held the note of the firm, and upon this note she had brought an action, and the firm had suffered judgment by default, and an execution was thereon placed in the hands of the sheriff on the 27th of August. This was done, as stated by Allan, in order to protect the goods from other creditors, and so that Mrs. Newcome should be paid. The sheriff did not, however, make a levy upon any goods until the 10th of October. On the 8th of October, the partner Allan, who chiefly conducted the wheat transactions, without consulting his partner Newcome, and as Newcome stated without his knowledge, made a bargain with the plaintiff to sell him the 698 bushels of wheat then stored at Squair's mill, which was some miles from the village of Orono. The sheriff's officer levied under Mrs. Newcome's *fi. fa.* on the 10th of October, a little after

12 o'clock in the day, and at that time the officer did not know of the wheat in Squair's mill. Immediately after the seizure of the goods in store, Allan went to the plaintiff, and gave him an order on Squair for delivery of the wheat to the plaintiff, and the plaintiff promised him payment upon Squair accepting the order. The order was sent upon the afternoon of the 10th to Squair, and he accepted it, and on the 11th of October the plaintiff paid Allan the money for the wheat. On the evening of the 10th of October, Mrs. Newcome gave information of the wheat being in the mill, and directed that it should be seized. An officer was sent to Squair's Mill on the 10th of October, to seize the wheat, but Squair told him that Allan & Newcome then had no wheat there. The officer who had seized the goods at the store found there Squair's receipt for the quantity of wheat specified, and on the 11th of October the officer went to the mill, when Squair gave him the same answer that he had done the day before. The officer, however, insisted on seizing, and did seize the wheat on the 11th of October. On the 14th of October, the defendants' writ of execution was placed in the sheriff's hands. The sheriff's officer did not go again to make another levy upon that writ, for he had already on the 10th seized the goods in the store, and on the 11th had seized the wheat at the mill, and given Squair notice of it, which was all done upon Mrs. Newcome's execution. Between the 11th and 25th of October Squair informed the officer of all the circumstances, and how the plaintiff had bought the wheat, and that he had accepted Allan's order for the delivery of the wheat on the 10th of October. The sheriff's officer being under the impression that Squair was screening the property, on the 25th of October put a man in charge.

The question was whether the levy made on the 10th and 11th of October prevented Allan and Newcome from having a disposing power over the wheat, so as to cut out the defendants' execution, which came into the sheriff's hands on the 14th of October.

A verdict was taken for the plaintiff, subject to the opinion of the court.

M. R. Vankoughnet, for the plaintiff, cited *Edwards v. English*, 7 E. & B. 564; *Grant v. Wilson*, 17 U. C. R. 144, 148.

Cameron, Q. C., contra, cited *Taylor et al. v. Jarvis*, 15 U. C. R. 21.

ROBINSON, C. J., delivered the judgment of the court.

It does not seem to have been questioned at the trial that the sale of the wheat by Allan, one of the partners, to the plaintiff, Tucker, on the 8th of October, was a *bonâ fide* transaction, free from any fraudulent collusion with Tucker to defeat or delay creditors. If there had been any surmise to the contrary, the opinion of the jury would have been taken upon it.

Then, on the 10th of October, Squire, by whom the wheat was held in store for Allan & Newcome, accepted their order in favour of the plaintiff, to deliver the wheat to him, and on the 11th of October the plaintiff paid for the wheat.

The sheriff's bailiff, in the meantime, on the 11th of October, having a *fi. fa.* in his hands against the goods of Allan & Newcome, at the suit of Mrs. Newcome, had seized upon their goods at their own place of business, and becoming aware of the fact that Messrs. Allan & Newcome had this wheat in store at Squire's, went there on the 11th of October, and seized there 698 bushels of wheat.

If the bailiff did this under the impression that the *fi. fa.* at the suit of Mary Newcome, which he held on the 10th of October, had disabled Allan & Newcome from afterwards completing the sale and transfer of the wheat to the plaintiff, either on the 10th or 11th of October, when the wheat was first paid for by the plaintiff, he was clearly in error, at least in his application of the law. It might have interfered with the power of Allan & Newcome to dispose of the wheat to the prejudice of Mrs. Newcome, whose execution was then in the sheriff's hands, but she is no party to this litigation, and for all we know the debt may have been satisfied.

The only question in this case is, whether the *fi. fa.* at the suit of these defendants gave them such an interest in the

wheat as disabled Allan & Newcome from selling the wheat to Tucker on the 10th or 11th of October, and it is clear that it did not, for that execution was not delivered to the sheriff till the 14th of October, up to which day Messrs. Allan & Newcome were at liberty to sell the wheat to any one, so far as these defendants were concerned. Nothing obstructed them but Mrs. Newcome's writ, (if that did,) and that only formed an impediment so far as it might be necessary to protect her interests. The moment her debt was paid, the title of Allan & Newcome would be unimpeachable, and while she was unsatisfied it gave to her only a right to contest the sale. The wheat was all the time the property of the plaintiff, subject only to Mrs. Newcome's right to seize and sell it if she chose.

Judgment for the plaintiff.

REID V. FOSTER ET AL.

Dower—Informal issue—Allegation of demand—Evidence of offer to assign.

To an action of dower, alleging a demand made pursuant to the statute, the tenants pleaded *tout temps prist*. The demandant replied that she requested her dower more than one month and less than one year before action, but that the tenants did not endow her, and that the judgment for the said damages and endowment shall wait till the said issue is tried. The tenants joined issue. The evidence proved a demand, and that the tenants said demandant might have her dower, but did nothing.

Held, that an issue was sufficiently formed upon the record, and that upon the evidence the demandant was entitled to a verdict, and to costs.

The declaration was in the usual form where there is no allegation of the husband dying seized, nor any claim for damages; but after the words "whereof she hath nothing" was added, "and whereof demand of the same was made on the 4th day of June, 1859, pursuant to the statute."

The tenants pleaded *tout temps prist*, in the usual form.

The demandant replied to this, that she requested her dower more than one month and less than one year before action from the said tenants, but that they did not, nor would either of them, endow her, and that the judgment for the said damages and endowment shall wait till the said issue is tried. "And the tenants join issue."

At the trial, at Woodstock, before *Burns, J.*, the learned judge doubted whether upon this record there was a perfect

issue framed, as the replication did not traverse the plea except by inference. The evidence, however, sustained the replication, and he therefore directed a verdict for the demandant, reserving leave to move.

Beard obtained a rule *nisi* on the leave reserved, to enter a verdict for the tenants, on the ground that no proper issue was joined on the record. He cited *Hawkshaw v. Hodgins*, 11 U. C. R. 71; *Ryckman v. Ryckman*, 15 U. C. R. 266.

Duggan, Q. C., shewed cause, and cited *Jones v. Jones*, 2 Cr. & J. 601; *Humphries v. Barnett*, 16 U. C. R. 463; *Quin v. McKibbin*, 12 U. C. R. 323; *Bishoprick v. Pearce*, *ib.* 306.

ROBINSON, C. J.—It appears to me that the parties were at issue on the plea of *tout temps prist*, and that upon the evidence we cannot enter a verdict for the tenants; and as there was no evidence of any offer to assign dower after demand was made, further than by one of the tenants saying to the bailiff when he made the demand, “let her take the lands,” or, “she may have the lands,” or something to that effect, I do not see that any thing could or should now be entered on the record to the effect “that the tenants made it appear on the trial that they offered to assign the dower,” in order that under the fifth clause of the statute they might be exempt from paying costs. The consequence is that the demandant can enter judgment for dower and for the costs.

BURNS, J.—This case differs from any of the cases we have yet had before the court in respect of dower, because the declaration alleges that the demandant had made a demand of her dower according to the form of the statute. This allegation, combined with the replication to the plea of *tout temps prist*, will, I think, form an issue. It is not artistically formed, it is true, but I think we must understand the parties to mean this—the demandant saying, “I have demanded dower and served you with notice in writing to that effect, one month before suit, and that suit com-

menced within the year from the demand made," and the tenants answering by saying, "you had no occasion to sue me, for I have been always ready and willing to render your dower to you."

This being then the issue upon this record, the next question is who is entitled to the verdict upon that issue on the evidence given at the trial. The person who served the written notice on the tenants was a bailiff employed for that purpose, and when the service was made the tenants replied that the demandant might have her dower. Both demandant and tenants being actors in the matter, the question is upon whom the burden lay to take the next step after the service of the written demand of her dower. According to what I have said in other cases, and which I still think is right, it was incumbent on the tenants either to take the initiative of assigning some part of the land, and giving the demandant notice of it, that she might take possession, or to appoint a time for the demandant to come to the land, and see whether they could agree about it, and this appointment should be notified by the tenants. It appears to me obvious this course must be taken by the tenants, for the demandant has no right to make entry until the dower be either assigned to her by the tenants, or she be put in possession under a writ of *habere facias seisinam*. The tenant saying, "you may come and take your dower," or, "I am ready to give it to you," is no answer to the written demand, and in my opinion does not sustain the plea of *tout temps prist*. The demandant in serving the written demand has done all she can do, for she has no right to take any part of the land by her own authority, and when the written demand has been served, if the tenant wishes to free himself from any expenses, and desires that the matter may be settled without the necessity of the intervention of the sheriff, he should within the month after notice served do something *actively* on his part towards settlement of the dower. His remaining *passive* after such action of the other in my opinion is no proof of his plea.

I think, therefore, the verdict should stand.

McLEAN, J., concurred.

Rule discharged.

LEONARD V. SUTHERLAND.

Lease—Construction—Right reserved to lessor to build upon part of the land demised.

Defendant leased to plaintiff "Sutherland's farm, being the west part of lot number 15, in the fourth concession of West Zorra, as at present occupied by the said Sutherland" for eight years, at a yearly rent. It was provided by the lease that the plaintiff should not cut down timber for the purpose of clearing outside the brush fence, but might clear all within, and might use all the woodland on the said leased premises for pasture, and "that the said Sutherland" (the defendant) "shall be at liberty at any time to build and make any improvements he may think proper upon any portion of the said leased premises lying outside the said brush fence at present upon the said premises, without any diminution of rent or any considerations therefor."

Held, that the defendant having improved and built upon a portion of the land outside of the brush fence during the term, was entitled to retain possession thereof.

EJECTMENT, to recover part of lot number 15, in the 4th concession of the township of West Zorra, being the land mentioned in a lease of the same premises made by the defendant to the plaintiff on the 17th of February, 1855.

The defendant confined his defence to that part of the land described thus :—"Commencing on the western boundary of the said lot number 15, in the 4th concession, 15 chains 54 links from the north-west angle of the lot; thence following an old brush fence north-easterly and south-easterly to land leased to the plaintiff; then following the western boundary of the land leased to the plaintiff to the southern boundary of the said lot; thence following the southern boundary of the said lot to the south-west angle thereof; thence following the western boundary of the said lot to the place of beginning."

At the trial, at Woodstock, before *Burns, J.*, it appeared that the plaintiff was tenant to the defendant under a lease dated 17th of February, 1855, for a term expiring on the 1st of April, 1863. The demise was of "Sutherland's farm, being the west part of lot number 15, in the 4th concession of the township of West Zorra, as at present occupied by the said Sutherland." The lease contained a stipulation that the plaintiff should not cut down timber for the purpose of clearing outside the brush fence then on the said premises, but might clear up all within the said brush fence, and might use all the woodland on the said

leased premises for pasture. Then followed this stipulation, "but it is agreed that the said Sutherland shall be at liberty at any time to build and make any improvements he may think proper upon any portion of the said leased premises lying outside the said brush fence at present upon the said premises, without any diminution of rent or any consideration therefor."

The whole farm as occupied by Sutherland when leased consisted of 110 acres, and that part of it lying outside of what was called in the lease the brush fence comprised about 37 acres, and was woodland. Since the granting of the lease the defendant had improved about 34 acres of the 37, and built a house thereon, and was living in it at the time this action was brought.

The plaintiff contended that the whole farm passed under the lease to him, and although the stipulation authorised the defendant to improve that part lying outside the brush fence, and comprising the 37 acres, yet those improvements so soon as completed enured to the benefit of the tenant, without any difference to be made in the rent.

On the other hand, the defendant contended that the effect of the stipulation in the lease, that he might improve that part of the farm outside the brush fence without any diminution of the rent, meant that when he did improve it he was entitled to have it considered as excepted from the operation of the lease.

The lease contained a stipulation that the plaintiff should pay all kinds of taxes, including statute labour "for the said farm."

A verdict was taken for the defendant, with leave to the plaintiff to move to enter a verdict for him if the court should think his construction the right one to give to the lease.

Beard obtained a rule *nisi* according to the leave reserved. He cited *Doe dem. Douglas v. Lock*, 2 A. & E. 724; *Shep. Touch.* 80; *Fancy v. Scott*, 2 M. & R. 335.

D. G. Miller shewed cause.

ROBINSON, C. J.—The dispute beteen the parties turns

entirely upon the construction of the lease made by the defendant to the plaintiff, and the question is whether a certain reservation made in the lease by the defendant, the lessor, entitles him to the actual and exclusive possession of that portion of the land which the plaintiff, the lessee, is endeavouring by this action to recover.

The instrument begins thus:—Articles of agreement made on the 17th day of February, in the year of our Lord, 1855, between William Sutherland, of the township of West Zorra, &c., of the one part, and George Leonard, of the same place, yeoman, of the other part, witnesseth, that the said William Sutherland hath agreed, and doth hereby agree to let the said George Leonard have the use of his the said William Sutherland's farm, being the west part of lot number 15, in the fourth concession of the said township of West Zorra, as at present occupied by the said William Sutherland, for the space or term of eight years. The said George Leonard agrees to take the said farm for the said term of eight years, and to pay for the use of the same the yearly rent of £25 currency, to be paid on the first day of April in every year during the said term. "The said William Sutherland agrees to give possession to the said George Leonard on the 20th day of March, 1855, said George Leonard to pay all kinds of taxes, including statute labour, for *the said farm*." Then follows a stipulation that the said Leonard shall draw 5000 rails from certain premises mentioned, which belonged to other parties, and lay them up in fences on the premises leased, for which Sutherland is to allow him £2 10s. a thousand. "And the said George Leonard further agrees to cut, split, and draw on the place, and lay up in fence on the said leased premises, 3000 rails from off the wood-land, on the said leased premises, for which he is to be allowed £2 10s. a thousand." And after that the deed proceeds thus:—"The said parties agree further, as follows, that is to say, the said George Leonard agrees not to cut down timber for the purpose of clearing outside the brush fence at present on the said premises, but may clear up all within the brush fence; and the said George Leonard further agrees not to cut any timber for the purpose of removing it off the

premises, nor remove any stones or other materials off the premises. The said Leonard may use all of the wood-land on the said leased premises for pasture, but it is agreed that the said William Sutherland shall be at liberty at any time to build and make any improvements he may think proper upon any portion of the said leased premises lying outside the said brush fence at present upon the said premises, without any diminution of rent, or any consideration therefor; said William Sutherland to have the privilege of one cow's pasture for the year 1855. And it is expressly understood that the decease of the said George Leonard may terminate this agreement or lease at the discretion of the surety." In witness whereof, &c., &c.

The defendant Sutherland has since the deed was made improved the land outside the said brush fence, and has built a house upon it, in which he is living. The whole farm mentioned in the lease consists of 110 acres. There are houses and barns on the other cleared part, which the plaintiff lives in and uses. The part outside of the brush fence is about thirty-seven acres, on which the defendant has built a house, and he has improved thirty-four acres of this since making the lease. The plaintiff contends that the deed only reserves to the defendant the privilege of building on that portion of the farm, and clearing up any portion of it that he may think proper during the term, and notwithstanding the demise; but that the whole land is nevertheless demised, and that whatever improvement the defendant might make under that privilege which he reserved to himself, enures to the benefit of the plaintiff as before, during the term, and that without any difference to be made in the rent.

The defendant, on the other hand, contends that whatever portion of the land outside of the brush fence he should build or improve upon, was to become by such improvement excepted thenceforward out of the lease, and he insists that the stipulation that there shall not be on that account any diminution of the rent proves that to have been the intention.

The land described as being outside of the brush fence seems to have been uncleared at the time of making the lease, but whether in part cleared, so as to be used as a

bush pasture by the lessee, does not appear from the evidence.

In my opinion the verdict was rightly rendered for the defendant. Though there may appear to be some room for doubt as to what was really intended by the instrument, yet it is reasonable to infer that they must have meant what the defendant insists upon, namely, that although the land on both sides of the brush fence was unquestionably demised in the first instance, yet the defendant was to be at liberty to build upon that part of the lot which was outside of the brush fence, and to clear it and cultivate it, or any part of it, and that as fast as he did clear it up he should be allowed to possess and use it, without abatement being made in the rent on that account. The last stipulation, as to the rent not being diminished, is expressed in the lease, and it shews that the rent had been calculated with reference only to the land that was in a state fit for cultivation, but that the lessee nevertheless should have the privilege of possessing this land beyond the brush fence, as well as the other, for his cattle to run in until the lessor should choose to clear and occupy it.

McLEAN, J.—The right of the plaintiff to recover depends wholly on the construction of the lease. There is no doubt that the description given of the premises intended to be leased—"William Sutherland's farm, as at present occupied by the said William Sutherland"—are comprehensive enough to cover the part now claimed to be recovered by the plaintiff, and if the right depended on the description the plaintiff must succeed; but in the subsequent part it is shewn pretty clearly that the portion outside of the brush fence was not intended to be actually contained in the lease as part of the leased premises, for it was stated that the lessee *may use all the woodland on the premises for pasture*, and if it was intended that the woodland should be leased with the rest there could be no necessity for limiting the use of it to pasturage; and then it is agreed that the lessor, Sutherland, may build and make any improvements he may think proper on any portion of the premises lying *outside the brush fence*, without any *diminution of rent or consideration therefor*.

It is obvious from this that the plaintiff was to pay £25 a-year for the premises inside of the brush fence, having the privilege of using the woodland for pasture for his cattle, but with a right reserved to the lessor to build upon and improve for his own use any portion of the land outside of the brush fence, without the tenant being entitled to claim any diminution of rent or any consideration whatever on that account. The defendant has built and improved on part of the land according to the right reserved, but the plaintiff now says that though he had a right to build and improve, he has no right to use his buildings and improvements, but is bound to give them up to be used without any increase of rent by the plaintiff, his tenant. It does not appear when the house was put up and the improvements made by the defendant, but by the lease possession was to be given, and we may assume was given, to defendant on the 20th of March, 1855, and this action is brought on the 6th of September, 1859, when nearly five years and a-half of the term have expired, from which a strong inference may be drawn that it is only recently that the plaintiff has made up his mind to construe the lease as he now desires to do. The meaning and intention of the parties are too manifest to admit of the plaintiff succeeding in this action, and I think the verdict entered for the defendant ought not to be disturbed.

BURNS, J., concurred.

Judgment for defendant.

MIDDLEBROOK ET AL. V. THOMPSON, SHERIFF.

Agreement to furnish saw logs—Delivery—Chattel Mortgage Act—22 Vic., ch. 96, sec. 19.

One H. agreed with B. to furnish him with from 8 to 10,000 saw logs, to be paid for on delivery, and a small sum was received by him on account. Afterwards H. agreed to get out logs for the plaintiffs, the money for them to be paid to one D., to whom H. was indebted. A large number were got out during the winter by H., and while on the ice he marked 1040 with the plaintiffs' mark. When the ice broke up all were floated down together and became mixed. The plaintiffs accepted and paid orders on them by H. in D.'s favour for £200 on account, and afterwards a delivery was made by H. to them of 1040 logs, by delivering some in the name of that number out of the whole, which were still together. B., who had made large advances to H. on his agreement, then got execution on a judgment which H. allowed to go by default, and under it seized all the logs.

Held, that the plaintiffs were entitled to recover for the 1040 logs so sold and delivered to them, and that neither the Chattel Mortgage Act nor the 22 Vic., ch. 96, sec. 19, would have applied to such sale, even if the jury had not found, as they did, that there was an actual and continued change of possession, so far as there could be under the circumstances, and that H. was not insolvent.

This was an action of replevin brought to recover from defendant the value of 1040 white pine saw logs, which the plaintiffs alleged the defendant wrongfully seized and detained, being their property. There was a second count in trespass.

Pleas:—1st. Not guilty. 2nd. Denial of plaintiffs' property.

At the trial, at Perth, before *Richards, J.*, it appeared in evidence that one Horswell, on the 12th of September, 1858, entered into an agreement with C. Blodgett & Son, to furnish them during the next season, from 8,000 to 10,000 standard white pine logs of certain lengths, to be delivered in their mill-pond in the township of Montague, at certain prices, and to be paid for on delivery, which logs were to be culled and selected when they should arrive at Pike Falls. In the contract Horswell acknowledged to have received, in certain gold watches, payment in full for 150 standard logs, and in three silver watches payment in full for 38 standard logs, and a cow at \$20.

Under this agreement Horswell appeared to have gone on to get out logs, and Blodgett & Son made him large advances in money and otherwise. Horswell had in previous

years got advances from one Draffin, and he was indebted to him in a considerable sum. The plaintiffs, in February, 1859, applied to Horswell to get out logs for them to the amount of his debt to Draffin, and Horswell then marked 1040 logs with the plaintiffs' mark, which were then on the ice. It was intended to mark a larger number of logs in the plaintiffs' name on account of the debt due to Draffin, but it became dark and the snow went away, and no more logs were marked. All the logs originally got out for Blodgett & Son were on the ice at the time, and Blodgett & Son, when they heard of the logs intended to be delivered to the plaintiffs, objected to any division of the logs then there, and some mark was put on them, or on a portion of them, in their names. When the ice broke up and the streams opened all the logs were brought forward together towards their destination, and the 1040 which had been marked became mixed up in a mass of 10,000 or 15,000 logs, so that it was impossible to separate them. Horswell gave Draffin two orders on the plaintiffs, amounting together to £200, on account of the logs which had been marked, and the plaintiffs paid that amount on the orders, which were dated on the 7th of May, 1859. On the 11th of June, 1859, Horswell gave authority to James Connel, his foreman, to deliver to James Watson for the use and benefit of the plaintiffs all his right, claim and interest in 1040 saw logs, measured and marked by them, and for which two orders had been given on them in favour of Draffin. Under that authority Connel delivered to Watson possession of some of the logs marked with the plaintiffs' mark, and he delivered these in the name of the whole number of 1040 logs mixed up in the general mass. While the logs were being brought down the stream, Draffin obtained a judgment and execution against Horswell for the balance due him, and Blodgett & Son then paid up that execution rather than run the risk of being deprived of the saw logs. Horswell being indebted to other parties, Blodgett & Son thought it most prudent to get a judgment and execution against him, and they were allowed to do so by Horswell. Under that execution the defendant seized all the logs, and

though notified of plaintiffs' claim to 1040 of them before the sale, he sold them all for £1225, and Blodgett & Son became the purchasers. The defendant was indemnified by Blodgett & Son, and this action was brought for the logs marked in the plaintiffs' name, and delivered in the manner before mentioned

On the trial, the learned judge requested the jury to find whether at the time of the transfer Horswell was insolvent, and whether the debt to Blodgett was *bonâ fide*, and if so, whether the permitting Blodgett to get judgment by default was in fraud of other creditors, to give him a preference through an execution which he could not legally get otherwise. The jury were also asked to say if the agreement to sell the logs to the plaintiffs was *bonâ fide* and for a valuable consideration, and whether there was a delivery to the plaintiff, and a continuous change of possession until the arrival of the logs at Pike Falls, on the river Tay: that is, such a delivery and possession as the nature of the property and its position permitted. They were directed, if they found that Horswell was not insolvent, and that his transfer to the plaintiffs was in good faith and for a valuable consideration, and that the logs were delivered to the plaintiffs, and continued in their possession as far as the position and nature of the property permitted, they should find for the plaintiffs; otherwise for the defendant.

The jury found that the delivery to the plaintiffs and the change of possession were as complete as the nature and position of the property would permit; that Horswell was not insolvent at the time of the delivery, and that if he was so the plaintiffs did not know it; and they found a verdict for the plaintiff, and £200 damages.

Leave was reserved to the defendant to move to enter a verdict for him, if the court should be of opinion that under the statute the plaintiffs were not entitled to recover, the parties consenting that the court might draw any further inferences of fact as if found by the jury, if necessary to the determination of the case.

Prince obtained a rule *nisi* accordingly, to set aside the

verdict, and to enter a nonsuit or a verdict for the defendant, or for a new trial, on the grounds that the verdict was contrary to law and evidence, the assignment under which the plaintiffs claimed being void under the statutes relating to transfers of personal property.

Deacon shewed cause, and cited Addison on Contracts, 245; Proudfoot v. Anderson, 7 U. C. R. 577; Franklin v. Neate, 13 M. & W. 481; Camp v. Camp, 2 Hill 628; Hanford v. Artcher, 4 Hill, 271, 297.

Prince, contra, cited Short v. Ruttan, 12 U. C. R. 79; Heward v. Mitchell, 10 U. C. R. 542; Wilson v. Kerr, 17 U. C. R. 168; Cummings v. Morgan, 12 U. C. R. 565; Maulson v. Commercial Bank, 17 U. C. R. 30; Harris v. The Commercial Bank, 16 U. C. R. 437; Waldie v. Grange, 8 C. P. 431.

ROBINSON, C. J.—The jury found for the plaintiffs, and I think rightly, on the evidence, independently of any question of Horswell having suffered a judgment to go against him, not altogether in good faith, in order to facilitate the object of Blodgett & Son in getting hold of the logs as Horswell's.

The contract with Blodgett & Son was but an executory contract, and it is not pretended on their part that what had passed between them and Horswell had made the logs theirs. On the contrary, they had them sold on their writ as being Horswell's logs.

The question, then, is, whether the 1040 logs had or had not become the property of the plaintiffs before the sheriff seized them.

I think they had, for by the agreement between them and Horswell the logs cut for them were to be marked for the plaintiffs on the ice of the lake, which these logs were, and they were to be allowed to hold them for their advances, and they were afterwards actually delivered to them as they were on their way at Allan's Pond, and they paid the orders of Horswell in favour of Draffin, drawn upon them according to their contract, for the price of the logs.

I do not think that the Chattel Mortgage Act creates any

difficulty in the plaintiffs' way, for the logs were got out from the first on an executory contract, as a tradesman, makes up any other articles for a customer; they were not turned over to satisfy or secure a pre-existing debt; and besides the jury found, and I think reasonably upon the evidence, that the possession was changed, and continued so, as much as in the nature of things it could be.

McLEAN, J.—There is nothing in the contract with Blodgett & Son to give them any property in the logs which were to be got out by Horswell, and so satisfied were they that the logs were subject to the disposal of Horswell, that they thought proper to obtain a judgment and execution in order to secure them to cover the amount of their own advances. All the logs were intended for Blodgett & Son, except the 1040 which were marked with the plaintiffs' mark; and if the testimony is correct, nearly 8000 logs were seized and sold by the defendant under Blodgett's execution, for about £1225. When Horswell was getting out the logs, he had a right to transfer them to the plaintiff or any other persons for a valuable consideration, and the orders given on the plaintiffs in favour of Draffin certainly constitute a good consideration between the plaintiffs and him. The logs were absolutely assigned, not mortgaged or transferred in security for a debt, and they were marked at the time in the plaintiffs' name, before Blodgett & Son had assumed any control or had any thing to do with them. Subsequently, when the logs were in the water, besides the implied delivery arising from the plaintiffs' mark being put upon the logs, there was an actual delivery so far as it could be made; and the jury have found that such delivery was followed by an immediate and continuous change of possession, as far as the position of the property could admit. There was, according to the finding of the jury, nothing wanting to make the sale to the plaintiffs complete and binding in law. But the defendant alleges that Horswell was in insolvent circumstances, and that therefore, under the 19th section of 22 Vic., ch. 96, the transfer was void, being intended to give the plaintiffs or Draffin a preference over other creditors. That Horswell

was indebted to several persons in considerable sums, at the time of the assignment, was shewn by his own testimony, but the jury have found that he was not insolvent, and that the plaintiffs were not aware of his being insolvent. The debt on account of which the logs were assigned to the plaintiffs was not one due to them, so that in getting the logs from Horswell they were not getting any preference as creditors. They were then paying their money to Draffin for the logs, which Horswell was willing should be applied to the payment of a part of a debt due to Draffin. We cannot hold, I think, that a person who happens to be involved in debt is not at liberty to pay a portion of a debt to one creditor, because he cannot at the same time meet all his obligations. To hold so would be to declare that a man who cannot pay all his debts must not pay any till he is able to pay all, and that if he does so he will be guilty of a fraud. But the jury have on the facts submitted to them found that Horswell was *not insolvent*, and I cannot say that the evidence establishes satisfactorily that they were wrong in coming to that conclusion, or that the transfer of the logs to the plaintiffs by Horswell was for any fraudulent purpose whatever.

My opinion, therefore, is that the rule to enter a nonsuit or a verdict in favour of the defendant must be discharged.

BURNS, J., concurred.

Rule discharged.

FORD V. LANGLOIS.

Criminal conversation—Proof of marriage.

To a declaration alleging "that the defendant debauched and carnally knew the wife of the plaintiff," defendant pleaded only not guilty.

Held, that upon this issue it was not necessary to prove that the woman was the plaintiff's wife.

The declaration was in these words, "For that the defendant debauched and carnally knew the wife of the plaintiff."

Plea :—Not guilty.

At the trial, at Sandwich, before *McLean*, J., the plaintiff's counsel contended that on the issue he had only to

prove the carnal intercourse, the marriage not being denied.

The defendant's counsel, on the other hand, insisted that it was incumbent on the plaintiff, since he had not given the name of the woman, to prove a criminal intercourse with some woman who was really his wife, for that there was no other means of identifying the person: that the defendant could not in answer to this declaration deny the marriage, for it would have been insensible to plead that the plaintiff's wife was not his wife.

The plaintiff then offered to prove that a certain woman had lived with him as his wife, and been reputed and known as such, and that the defendant had acknowledged that the woman said to have been debauched was the plaintiff's wife.

The learned judge held that kind of evidence to be insufficient for the purpose of this action, and nonsuited the plaintiff.

Prince, for the plaintiff, moved to set the nonsuit aside. He cited *Kenrick v. Horder*, 7 E. & B. 628.

O'Connor supported the rule.

The court, on the authority of the case cited, made the rule absolute, *McLean*, J., remarking that, although he disapproved of the decision, he thought it better to be bound by it.

Rule absolute.

MANN AND HOBSON V. THE WESTERN ASSURANCE COMPANY.

Insurance—Affidavit and certificate of loss—Time of furnishing—Reasonable time, whether a question for the court or jury—Interest of plaintiffs.

The plaintiffs brought an action against these defendants on a policy of insurance, which provided that the assured should "give immediate notice of any loss or damage by fire within fourteen days, to the agent of the company," &c., &c., and, "as soon after as possible," should deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation: * * that they should also make a declaration and produce certain certificates specified; and that until such proofs, declarations and certificates were produced, the loss should not be payable.

At the trial the notice required was proved, but the certificate and affidavit produced were afterwards held by the court to be insufficient, and a nonsuit was entered. The plaintiffs then, about eleven months after the fire, furnished a new and sufficient affidavit and certificate, and brought another action, in which the defendants pleaded that the plaintiffs did not as soon after the fire as possible deliver these papers. It appeared that when the first papers were furnished defendants objected to their sufficiency, and that others were a few days after delivered, to which it was not shewn that the plaintiffs were notified of any objection until the first trial.

Held, that the words "as soon as possible" must be construed to mean within a reasonable time under the circumstances; and, *Burns, J.*, dissenting, that it was properly left to the jury to say whether, considering all the facts, the defendants had complied with the condition by furnishing the second set of papers, and was not a question of law upon which the judge should have decided.

The plaintiffs, while in partnership, had purchased the land, on which they afterwards built the mill in question, which was burned, from one A., who held their bond for the balance of purchase money. Before the fire they dissolved partnership by a deed, in which it was agreed that Mann should wind up the business, and should hold "the mill property" for his own use, but no regular conveyance of it had been executed.

Held, that Hobson had sufficient interest to enable him to join in suing on the policy.

Held, also, that the affidavit and magistrate's certificate last furnished were sufficient, though Mann, who alone made the affidavit, was described as solely interested in the property, and the certificate stated the loss as his only.

This was a new action upon the same policy mentioned in the report of the case between the same parties in 17 U. C. 190, the plaintiffs having consented to take a nonsuit in that action.

The defendants relied in this present action not only upon the same defences set up in the former case, but in addition they pleaded:—1. That the plaintiffs were not interested as alleged in the declaration.

2. That the plaintiffs had not produced to the defendants the proofs, declarations and certificates required by the ninth condition endorsed upon the said policy, and without

which proofs, declarations and certificates, the said loss, if any, was not payable.

3. That the plaintiffs did not, on the occasion of the said loss, use their best endeavours to save and preserve the said property so insured as alleged.

4. That the fire was begun and caused by the plaintiffs, or by their procurement, and that of others in collusion with them, with the intent and design of fraudulently and feloniously destroying and consuming the premises ; and

5. That the plaintiffs did not as soon after the said fire as possible produce or deliver to the defendants a particular account of such loss and damage, with the certificate of a magistrate or notary public, in accordance with the ninth condition endorsed upon the policy.

The trial took place at Berlin, before *Burns, J.* The plaintiffs relied upon the same notices, certificates and proofs used at the former trial. Before the present action was commenced, the plaintiff Mann, on the 12th of April, 1859, made out an account of the loss of the mill, signed by himself alone, and appended thereto made an affidavit before a justice of the peace, in which he stated that the whole value of the saw-mill at the time of the fire was \$24,000 : that at the time of the fire it was not insured in any other company than that of the defendants, and no other insurance had been made thereon except that with the defendants for £250 : that originally the property was purchased by him, Mann, in connexion with the other plaintiff, Hobson, from one Ainslie, to whom they paid a portion of the purchase money and gave their bond for the balance, and at their dissolution, on the 1st of June, 1858, was transferred to Mann by Hobson, and was at the time of the fire occupied and used as a saw-mill only. He further stated that the fire was first observed between eleven and twelve o'clock on the night of Saturday the 3rd of July, 1858, when flames were first seen issuing from the roof of the building : that as to how the fire originated he was unable to give any particulars, being ignorant of the fact : that all he had stated above was true, so far as he knew or believed ; and that the saw-mill was occupied by himself.

Annexed to this affidavit was a certificate, under the hand and seal of the same magistrate named in the report of the first trial, also dated the 12th of April, 1859, in which he stated that he had examined the circumstances attending the fire: that he was acquainted with the character and circumstances of Mann; and he verily believed that by misfortune, and without fraud or evil practice, Mann had sustained loss and damage on the mill by reason of the fire to the amount of £400.

These proofs, in accordance with the terms of the ninth condition endorsed on the policy, were furnished to the defendants on the 1st of June, 1859.

The deed of dissolution of partnership was put in, dated the 1st of June, 1858, but the instrument did not contain any specific transfer of Hobson's interest in the policy itself.

At the close of the plaintiffs' case, the defendants' counsel raised the following points as grounds of nonsuit;—

1. The same objections taken in the former case to the proofs furnished before the former action.

2. That Hobson, by assigning to the other plaintiff, ceased to have any interest in the property, and after that act the remedy should be in equity and not at law.

3. That if the plaintiffs' remedy were still at law upon the policy, then the last claim made and furnished to the company on the 1st of June, 1859, with the affidavit of the plaintiff Mann, was insufficient, being in the name of one of the plaintiffs alone.

4. That the fire having occurred on the 3rd of July, 1858, and the full proofs not being furnished to the defendants till the 1st of June, 1859, the fifth plea of the defendants was proved.

Leave was reserved to the defendants to move to enter a nonsuit on these objections, or any of them, if the court should think them entitled to prevail.

The defendants then gave evidence to sustain their fourth plea. One witness swore that he was watching his own premises against breachy cattle on the evening of the fire, and while he sat upon a log in his field, during the course of

the evening, being a bright star-light night, he saw the plaintiff Mann go to the mill, and after taking some tools, some of which he carried to his house, and after throwing an axe into the mill-race, he deliberately set fire to the mill by placing shavings against the side of it and setting fire to them, and then he set off for Galt. This happened, he said, between nine and ten o'clock on a fine summer night. The witness was in his own field at the time, about 70 or 80 feet from the mill. "I thought it was best," the witness added, "to say nothing about it, and so I went home and went to bed; but a neighbour called me, and then I went to the fire and tried to save what lumber I could. I spoke to a friend of what I had seen and he advised me to hold my tongue."

Upon cross-examination, the witness said, among other things, "He remained at the house about a quarter of an hour, and I sat still all the while. I thought it suspicious, and would see what happened next. I have had a dispute with Mann about a lawsuit. Goodall's premises were in danger from sparks, &c., but I did not go to inform him.** I might have said to Walker that Mann could not have done it; I don't mind of it."

Another witness, the sawyer, proved that he had a box of tools in the mill in which he had put some augers belonging to the plaintiff Mann, and had locked the chest the afternoon before the fire. He swore that when searching for the remains of the tools he found the lock of the chest, and it was broken; also that he observed the augers he had put into the chest in the house of Mann after the fire: that when speaking about it to Mann both Mann and his wife cautioned him against speaking in that way, for fear it might come to the knowledge of the company; and that Mann further stated to him, that if he succeeded in obtaining the insurance money, he, the witness, should be no loser by his chest of tools being burnt.

Evidence was also given to shew the embarrassed circumstances of the plaintiff about the time of the fire, and that the mill was about standing idle for want of logs to saw up. The policy was put in and used by both parties. The ninth condition is set out in the report of the former trial.

The learned judge left it to the jury to determine, upon

the evidence on the fourth plea, whether they were satisfied that the plaintiff himself destroyed the property or was accessory to it.

Also, upon the fifth plea, the question was put to the jury to say whether, as a matter of fact, the omission to furnish the fresh proofs until the 1st of June, 1859, when the fire occurred on the 3rd of July, 1858, was sufficient to prove the plea, which asserted that the plaintiffs did not as soon after the fire as possible produce a particular account, &c.

The learned judge was not altogether satisfied that the question upon the fifth plea was one of fact for the jury, but rather inclined to consider that it was a legal question for the court to determine upon the facts proved, and he therefore reserved that question for determination by the court, with the other points raised for nonsuit.

The jury found in the plaintiffs' favour on both questions.

Duggan, Q. C., obtained a rule to shew cause why a nonsuit should not be entered pursuant to the leave reserved at the trial, or why a new trial should not be had, the verdict being contrary to law and evidence and the judge's charge upon the fourth plea.

Read, Q. C., shewed cause, and cited *Mann and Hobson v. Western Assurance Co.*, 17 U. C. R. 190; *Notman v. The Anchor Ins. Co.*, 4 Jur. N. S. 712; *Foster*, officer of the *Britannia Life Assurance Association v. The Mentor Life Assurance Co.*, 18 Jur. 830; *McMasters v. Westchester Ins. Co.*, 25 Wend. 379; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 400; *Columbia Ins. Co. of Alexandria v. Lawrence*, 10 Peters 507, 513; *Ellis v. Thompson*, 3 M. & W. 453; *Thompson v. Gibson*, 8 M. & W. 288; *Facey v. Hurdom*, 3 B. & C. 213; *Wing v. Harvey*, 5 DeG. M. & G. 265; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Pitt v. Shew*, 4 B. & Al. 208.

Duggan, Q. C., contra, cited *Rhind v. Wilkinson*, 2 Taunt. 237; *Cohen v. Hannam*, 5 Taunt. 101; *Powles v. Innes*, 11 M. & W. 10; *Bell v. Ansley*, 16 East 141; *Wright v. Welbie*, 1 Chitty Rep. 49.

ROBINSON, C. J.—With respect to the fourth plea having

been proved, it is true that there was direct and positive evidence given by one witness that he saw Mann set fire to the saw mill; and if the testimony of that witness had been credited by the jury, they could not have done otherwise than find for the defendants on that plea. But the account given by that witness of what he saw and did that night is so improbable on the face of it, that we cannot wonder that the jury were not satisfied that they could safely rely upon it. Besides his evidence, there was some testimony from another witness that was well calculated to raise suspicion, but all went fairly to the jury, and upon a review of the whole testimony we think we cannot hold that the verdict was so clearly against evidence that we ought to grant a new trial in order to give the defendants a second opportunity of setting up that defence. Every case of this kind must depend on its own circumstances. We have no doubt that the court can grant a new trial after the acquittal of a defendant on such a plea, but it should only be in a case where there really seems no room to doubt that the verdict is against the truth of the case.

As to the first plea, which denies that the plaintiffs were interested at the time of the loss. When they insured they were equitable owners only, under a contract to purchase from a third party, upon condition of making certain payments, which are not yet all due. They had such an interest, being equitable owners in possession, as enabled them to insure. The question is as to the effect upon the policy of the proof that was given of Hobson having, upon the dissolution of the partnership, not long before the fire, given up his interest in this "mill property" to Mann. It was not shewn that Hobson had by any legal instrument conveyed his equitable estate to Mann, which it has been held must be shewn in such cases; (a) he merely, in the deed of dissolution, consents that Mann shall have, possess and enjoy it. The deed contains no operative words of grant. They both still stand bound to Ainslie, the vendor, for the purchase money, and Hobson has therefore an interest in the property, which he may be compelled to pay

(a) See Angell on Insurance, sec. 195.

for in case Mann should fail to do so. Under such circumstances, it appears to me that Hobson cannot be said to have alienated so as to have disabled himself from joining in the action on the policy, though he may be considered as allowing his name to be used for the benefit of Mann. ✓

With respect to the exceptions taken to the sufficiency of proof of timely notice of the loss, and of the affidavit and certificate which the terms of the policy require should be furnished, the plaintiffs rely upon those which had been delivered before the first action was brought, as well as upon those which have been furnished since the trial of the last suit and before the commencement of this action. But we adhere to the decision we formerly came to in regard to the notice, affidavit and certificate, given and obtained in 1858, and cannot allow the affidavit and certificate produced in the former action to have been sufficient, for the reasons given in the case of Mann and Hobson v. The Western Assurance Company, (17 U. C. R. 190,) and which need not be repeated.

Then, are the plaintiffs entitled to recover under the papers furnished in April, 1859? The notice of loss that was given a few days after the fire we have held to be sufficient, and no question now arises upon that.

Then as to the affidavit and magistrate's certificate furnished in April, 1859, eight months after the fire, but before this action was commenced, they are I think in form sufficient, and I do not take it to be a fatal objection to them that Mann is described in the affidavit as being at the time of the fire solely interested in the property insured, and that the magistrate in the certificate spoke of the loss as being the loss of Mann alone. It could not be expected or required either that Mann should swear to what would be substantially untrue in regard to his interest, or that the magistrate should certify contrary to what he was told was the fact. The defendants' agent could not be misled as to the policy that was referred to, for it was clearly identified by the contents of both documents. All that is desired to be attained by calling for the affidavit and certificate is that the parties making the one and signing the other are apply-

ing such statements as they are required to make to the loss which was insured against, and the express reference made to the policy by its number can leave no doubt upon that point.

But the objection more particularly relied upon in regard to the affidavit and certificate furnished in April last, is that they were given too late.

When we granted the new trial in this case, at the instance of the defendants, it was suggested by me in giving judgment, (17 U. C. R. 199,) that if the plaintiffs desired it they might have a nonsuit entered instead of carrying their case a second time to trial, while they had only that affidavit and certificate to rely upon which the court had already determined to be insufficient; and that by taking that course they might have it in their power to free their case from some of the exceptions which had been taken to their preliminary statements and proofs of loss, in case it could be held that they are not necessary to be delivered within a certain time, but merely before action brought, or at all events without any unreasonable delay.

I was then referring to the ninth condition of the policy, which is set out verbatim in the report of the case, (17 U. C. R. 191,) and which makes it necessary for the insured to give immediate notice of any loss or damage within fourteen days, and as soon after as possible to deliver in a particular account of such loss or damage, signed with their own hands and verified by their oath or affirmation, and containing such statements as are required by this ninth condition to be made. The same condition then proceeds to require that the insured shall produce a certificate, under the hand and seal of a magistrate or notary public, setting forth certain particulars; and as nothing is said of the time within which such certificate must be furnished, we must take it to be meant that the certificate will be in time whenever the statement and affidavit would be in time; and we see what is said in the condition on that point, that they are to be delivered in as soon after the notice of the loss as possible. And at the end of the same ninth condition are these words: "And until such proofs, declarations and certificates, are produced, the loss shall not be payable."

Before bringing the present action, the plaintiffs have delivered a new statement on oath made by one of them, which I think is sufficient, and a new certificate given by the magistrate who had given the former defective certificate. Admitting these to be sufficient in form, we have now to determine whether the plaintiffs are in time with them; and in disposing of that question we must look at the issues upon the record.

The second plea sets up as a defence, "*That the plaintiffs have not produced to the defendants the proofs, declaration and certificate required by the ninth condition endorsed upon the said policy of assurance, and without which proofs, declaration and certificate, the said loss, if any there be to the said plaintiffs, is not payable by the defendants.*" Upon that plea, I think the plaintiffs are entitled to a verdict, for the proofs, declaration and certificate required by the policy, had been produced before this action was brought, and the plea does not set up as a defence that they were not furnished in time.

But by another plea, the fifth, the defendants have placed their defence expressly on this ground, "*that the plaintiffs did not, as soon after the said fire as possible, produce or deliver to the defendants a particular account of such loss and damage, together with a certificate of a magistrate or notary public, in accordance with the ninth condition endorsed upon the said policy of insurance.*"

The terms of this plea are very different from the other. The plaintiffs not having demurred to the plea, but having in the common form joined issue upon it, the jury were bound to find whether the defence pleaded was true, without reference to the sufficiency of the plea.

The question having been left to them, they found in favour of the plaintiffs upon the fifth plea as well as upon the others; and we are asked to grant a new trial generally, on the ground that the verdict is contrary to law and evidence, and the judge's charge, and that the fourth plea of the defendants was proved, which refers to the defence upon the merits, that the fire was not accidental, but was wilfully occasioned by the plaintiffs themselves. The find-

ing of the jury in favour of the plaintiffs upon the fifth plea is not particularly complained of in this rule, and was not, I think, made a ground for supporting the rule for a new trial upon the argument. If it had been, I should not have been in favour of granting a new trial on account of the verdict given upon that plea, for it is not complained that such finding was in consequence of any misdirection, and we ought not, I think, as a mere matter of discretion, to deprive the plaintiffs of their verdict on that issue. The plea itself is immaterial, for it denies that the plaintiffs did, as soon after the fire as possible, deliver a statement, verified by affidavit, of the loss, and a magistrate's certificate, &c.; whereas that is not what the condition referred to requires, but that they should be furnished as soon as possible after the notice of the loss had been delivered. Besides, after all that we know judicially to have passed in this case, it would not be advancing the ends of justice to grant a new trial on account of this being found against the defendants, in the absence of any misdirection.

The only point to be disposed of in connexion with that plea, I think, is that which was reserved at the trial, namely, whether the question of reasonable time for the delivery of the affidavit and certificate was properly a question for the judge to take into his own hands at the trial, or whether it should have been submitted, as it was, to the jury. It was proper, I think, to leave that question to the jury, with such directions as the learned judge might think proper, under all the circumstances of the case; (a) for this is not a case in which the time can be said to have been fixed by any rule of law, or by any course of judicial decision; though I do not mean to say that where there are no circumstances accounting for delay, and where the delay has been great, it may not be right in the judge to tell the jury that the statement has clearly not been furnished in time, according to the condition of the policy.

In this case notice of the loss was given in time, so that the agent had due opportunity to commence enquiry at

(a) See *Facey v. Hurdon*, 3 B. & C. 213; *Angell on Insurance*, secs. 233, 240, 244, 245; *Tay. Ev.*, secs. 28-32.

once ; and there is a good deal of force in the argument, that the concluding words of the condition, which provide that the loss shall not be payable till the affidavit and certificate are furnished, shew that as regards those papers all that is meant is, that before the insured can be in a condition to enforce payment he shall be put to his oath respecting the principal facts, which must be within his own knowledge, and must produce a certificate from a disinterested public officer, corroborating his statements in certain points. These are great checks, but we do not see that it can be of particular consequence that either the oath or certificate should be made or delivered without delay, as in the case of the notice, though, on the other hand, it will not be easy in any such case to hold that the words "as soon as possible" mean nothing stronger than the subsequent words, which would make it sufficient, if they stood alone, that the papers referred to should be delivered before payment of the loss can be demanded.

But I think the rule should be discharged as to the point regarding the proofs ; because it was not improper, in my opinion, to leave the question as it was left to the jury, looking at the peculiar circumstances of this case ; and if it had rested with the judge alone, I must say that I should be inclined not to pronounce on that point otherwise than as the jury did ; for when the first affidavit and certificate were delivered to the agent he kept them, and though he wrote to say that the papers were insufficient, he did not point out what the defect was. Then the parties had, in the interval between sending the first and the last set of papers, been in correspondence in regard to the loss, and the defendants have placed their defence upon another ground, which is apart from all such technical objections to preliminary proofs, and goes to the true merits of the claim.

In my opinion the rule should be discharged, as I believe we all agree that we should not upon the evidence grant a new trial in consequence of the plaintiffs' acquittal on the fourth plea.

BURNS, J.—With respect to the objections that this action

cannot be maintained in the name of Hobson with the other plaintiff, by reason of his having assigned and transferred his interest; and that if the action can be maintained in the names of both, then that the proofs, &c., furnished by one only of the plaintiffs in his own name is insufficient, I am of opinion that neither of them are entitled to prevail.

At the time the policy was effected they were in partnership and had equal interest. Before the loss happened the one partner assigned his interest in the partnership property to the other partner, and then the whole interest vested in Mann. If the partner had assigned his interest to another person, so that the interest was severed, it may be, perhaps, that such a severance of interest might have destroyed the policy. According to *Powles et al. v. Innes*, (11 M. & W. 10,) where part owners of a ship insure, and one of them transfers his share to a third person, the effect of that is to destroy the entirety of the policy. This case is different, for here the two plaintiffs were partners, and instead of transferring to one a stranger to the policy, as in that case, the transfer of the property is to one of those to whom the policy was granted.

I have not met with any thing in cases of partnership, where the policy is in the name of all the partners, which requires that proof should be in the names of all. I think that one of the persons may in his own name furnish statements and proofs to the company regarding the loss, where those statements and proofs sufficiently point to the precise property lost, as well as if all the partners joined in it.

Secondly.—With regard to the first set of proofs, I still think, as I did on the former occasion, that those are defective upon the points mentioned by me. The question therefore now is, whether the last proofs, furnished in June, 1859, before the bringing of this action, will remove the difficulty. That will depend upon the proper construction to be given to the ninth condition of the policy, and next, whether the question presented by the fifth plea of the defendants is one of law for the court alone to decide, after the facts of the case be obtained, or whether it is still a question for the jury. If the first of these propositions be

decided in the plaintiffs' favour, the second becomes unnecessary. I was inclined to favour the defendants at the trial, upon the proposition that it was rather for the court to say whether the proofs were a compliance with the terms of the condition, as contended for by their plea, than for the jury ; but then that was upon the assumption that the proofs were to be furnished *as soon as possible*. It has now been argued that the interpretation of the ninth condition does not bring in question that proposition, and that in truth the proper interpretation of it will disprove the fifth plea. Let us examine if this be so, for if it is, then of course it is not necessary to enter into that question. The last clause of the ninth condition is that until such proofs, declarations and certificates are produced, the loss shall not be payable. Now in this no time is mentioned, and it is only a condition precedent that the claimant shall not be paid until those things shall have been done. With regard to the certificate of the magistrate, I feel clear that it is not necessary that *that* should be furnished at any particular time, but it being done before the action brought is all that is required in respect of that proof.

The only other matter remaining is, whether the affidavit of the plaintiffs being made on the 12th of April, 1859, and furnished to the defendants on the 1st of June, is a compliance with the condition. I must say I do not think it is. This oath, it appears to me, is required to be furnished as soon *as possible* after the notice of the fire be given. I take that to be the meaning of the terms of the contract. I do not understand that the claimant may give notice of the fire within fourteen days, and then may wait any distance of time short of being barred by the statute of limitations in bringing the action, to give or furnish the affidavit required. It appears to me that by the expression *as soon as possible* was intended that the notice should be followed up with the proof of the assured without loss of time. I think, therefore, the defendants have in their fifth plea put the right construction upon the contract in that respect, and that the plaintiffs were not at liberty to take their own time in furnishing the required proofs by their affidavit, but that

the expression *as soon as possible* does not mean that it may be delayed for eleven months. The plaintiffs' counsel argued in this case that the circumstances of it, in consequence of a suit being brought on the former proofs, which the plaintiffs thought sufficient, and failed, were now sufficient to consider the new proofs as furnished *as soon as possible*. That may be a convenient argument for such a case as this, but it is against all law and authority to adjudge it legal to permit parties to try experiments, and when the experiment fails then to say that the facts creating the trial of the experiment furnish an excuse for not doing that which should have been done in the first instance.

This view of the construction of the condition of the policy compels me to enter upon the other consideration—whether it is a question for the court to determine, whether the facts proved sustain the defendants' plea, or whether it was a question for the jury to determine that point.

There was no dispute about the facts, requiring the jury to determine any thing with respect to it. The fire occurred on the third of July, 1858, and the plaintiffs' affidavit was made on the 12th of April, 1859, and furnished to the defendants on the 1st of June after. I adopt the argument, that *as soon as possible* should be interpreted to mean a reasonable time, governed by the circumstances of the case, and the question is whether reasonable time is a question for the court or for a jury. I think in most cases it is a question of law for the court, and not for the jury. The meaning of the expression "*as soon as possible*" is defined in the case of *Attwood v. Emery*, (1 C. B. N. S. 110,) to mean a reasonable time, regard being had to the circumstances. There is no doubt the cases are very conflicting upon the subject of reasonable time being for the court or a jury to determine, but it seems to me this case affords no room for saying that here it was a question for the jury. The plaintiffs had furnished what they considered sufficient proofs, and thereupon brought their action, and in the action failed. The reason why they furnished new proofs was not because they were delayed or prevented from doing so by any conduct of the defendants, but it was because the court adjudged

those which had been already furnished were not sufficient. If the plaintiffs' proposition be good, then they may go on *ad infinitum* furnishing proofs as often as the court adjudge those already furnished insufficient.

If the mere abstract question, whether omitting to furnish the proofs for eleven months after the fire, be one to be determined by the jury as one of reasonable time, yet the facts incorporated into this case, and not in dispute between the parties, in my opinion rendered the question one for the court and not for the jury. But taking the question in the abstract, independent of the particular circumstances of the case, I still think the current of authority establishes, that in the majority of cases what constitutes a reasonable time is a question for the court and not for the jury: that is, where there are no facts for their consideration. The rule laid down by the court in *Graham v. The Van Diemen's Land Company*, (11 Ex. 101,) is that reasonable time, in the absence of any rule of law applicable to the particular subject, is a question for the jury, if there are any facts for their consideration. Now in the case before us, if we take it that the notice of the fire was given in time, and that the affidavit of the particulars of the loss required by the contract to be furnished as soon after as possible, but was not furnished for more than ten months afterwards, there is no question of fact involved; and it does seem to me it is then altogether a legal question, whether that period of time having been allowed to elapse without any thing to explain why it has been so, the court must say whether the plaintiffs have brought themselves within the terms of the contract. Then if it be said there were facts shewing why the plaintiffs did not comply with the terms of the contract, and that an extension of reasonable time may go to the length of ten months, then it appears to me those facts were not such as entitled the plaintiffs to have them submitted to a jury. They did try to perform the condition precedent on their part, and failed, by the judgment of the court, to establish such proofs as were perfect, and I do not think that fact can be received as an excuse for not doing the act in a reasonable time.

I have attentively read and considered the cases cited to us from the American courts, but I am not disposed to follow the doctrine of waiver as there laid down, and to the same extent. I agree in this, that after the preliminary proofs have been furnished to the company, and the company has put its refusal to pay upon some ground irrespective of any technical objections, then I think the company may fairly enough be said to have waived the technical objections, and to rest their defence upon the ground they themselves put it on. But when the company has been altogether silent in the matter, and leaves the plaintiff to make out his case as best he can, he having the contract upon which he seeks to make them liable as well as themselves, I do not see that there is any obligation on the company to furnish their assistance in having the preliminary proofs correct, any more than any other branch of the contract. I must say I think the American courts have fallen into an error in this respect, and it looks to me very like the courts making contracts for the parties, instead of interpreting the contracts they have made for themselves.

I think the defendants were entitled to succeed on the fifth plea, and that the plaintiffs having failed to establish a cause of action by reason of not having complied with the terms of the policy, there should be a nonsuit.

McLEAN, J., concurred with the Chief Justice.

Rule discharged, *Burns, J.*, dissenting.

IN THE COURT OF ERROR AND APPEAL.

THE SAME CASE—AFFIRMED ON APPEAL.

The defendants appealed from the foregoing decision assigning as grounds of appeal:—

1. That the plaintiffs, to entitle them to recover, did not furnish to the defendants as soon as possible after the fire,

and after the notice of such fire, the proofs, declarations and certificates required by the ninth condition endorsed on the policy.

2. That the question of reasonable time in furnishing such proofs was not for the jury, but for the court to determine.

3. That this action cannot be maintained in the name of the plaintiff Hobson, with the other plaintiff, by reason of the plaintiff Hobson having assigned and transferred his interest in the insurance money.

4. That if this action can be maintained in the names of both plaintiffs, then the proofs furnished by one only of the plaintiffs in his own name are insufficient.

The case was argued in the Court of Appeal, on the 30th of June, 1860. (*a*)

In addition to the cases referred to in the arguments below,—

Cameron; Q. C., for the appellants, cited *Roper v. London*, 28 L. J. Q. B. 260, S. C. 5 Jur. N. S. 491; *Atwood v. Emery*, 1 C. B. N. S. 110; *Graham v. The Van Diemen's Land Co.*, 11 Ex. 101; *Powell on Ev.*, 98.

Read, Q. C., and *M. C. Cameron*, for the respondents, cited *Sparkes v. Marshall*, 2 Bing. N. C. 774; *Ogden v. The Montreal Ins. Co.*, 3 C. P. 497; *Carruthers v. Sheddon*, 6 Taunt. 14; *DeForrest v. Bunnell*, 15 U. C. R. 370; *Moyer v. Davidson*, 7 C. P. 521; 3 Inst. 165; 4 Inst. 278; *McSwiney v. Royal Exchange Assurance Co.*, 14 Q. B. 634; *Boehm v. Bell*, 8 T. R. 154; *Irving v. Richardson*, 2 B. & Ad. 193; *Hibbert v. Carter*, 1 T. R. 745; *Hunt v. Royal Exchange Assurance*, 5 M. & S. 47; *Robinson v. Hofman*, 4 Bing. 562; *Cornell v. LeRoy*, 9 Wend. 163; *Figgins v. Ward*, 2 Cr. & M. 424; *Thomas v. Shillibeer*, 1 M. & W. 128; *Mitchell, ex parte*, 14 Ves. 597; *Heward v. Mitchell*, 11 U. C. R. 625; *Palmer v. Moxon*, 2 M. & S. 43; *Gordon v. The Massachusetts Fire and Marine Ins. Co.*, 2 Pick. 249; *Phillips on Ins.*, 119.

(*a*) Before Robinson, C. J.; Draper, C. J.; McLean, J.; Esten, V. C.; Burns, J.; Spragge, V. C.; Richards, J., and Hagarty, J.

DRAPER, C. J., delivered the judgment of the court, August 25th, 1860.

The defendants in the cause, the now appellants, have resisted the plaintiffs' claim to be paid the sum insured by the policy on distinct grounds. 1st. That the plaintiffs caused and procured the destruction of the premises by fire. 2nd. That the proper proofs, declarations and certificates required by the ninth condition endorsed upon the policy, were not produced and delivered to defendants, nor was a particular account of the loss or damage, with the certificate of a magistrate or notary public, produced or delivered to the defendants as soon after the fire as possible, in accordance with the ninth condition. 3rd. That inasmuch as the partnership between Hobson and Mann was dissolved by Hobson's retiring therefrom before the fire, either the action is not maintainable in their joint names, or if it be, then the proofs being furnished only in the name of Mann are insufficient to sustain such joint action.

The first ground of defence failed, the jury having found for the plaintiffs on that question, and there is no appeal founded upon the refusal of the Court of Queen's Bench to grant a new trial.

The defendants appeal on the second ground, because the plaintiffs did not furnish as soon as possible after the fire, and after the notice of the fire, the necessary proofs; and that the question of reasonable time for furnishing such proofs was for the court, and not for the jury to determine.

If it was a proper question for the jury, it was left to them, and they have disposed of it. The decision appealed from is the refusal to grant a nonsuit. Was it then a question for the jury?

This enquiry involves both the first and second grounds of appeal, namely, that the plaintiffs did not furnish to the defendants *as soon as possible* after the fire, and after the notice of such fire, the proofs, declarations and certificates required by the ninth condition; and that the question of reasonable time in furnishing such proofs was not for the jury, but for the court to determine. The appellants insist that judgment of nonsuit ought to be entered.

Though the ninth condition fixes a time within which the notice of the loss must be given, and though the giving it within the time named is apparently, according to the case of *Roper v. Lendon* (5 Jur. N. S. 491,) a condition precedent, yet no positive time is fixed for delivering the particular account of the loss or damage, signed, and verified by oath or affirmation. It must be done as soon after the giving the notice as possible, for that is, I think, the sense to be put upon the words "as soon after as possible"—a form of expression to be understood to mean in a reasonable time.

Now there may be several facts to be established before the question of reasonable time can arise. The "particular account of the loss" may require reference to other parties, some perhaps at a distance, vendors of goods or articles destroyed, from whom information may be required in order to give a detailed statement; or the assured may be at a distance, where news of the fire cannot promptly reach him; or he may be in ill health, or have met with an accident during the fire, or have suffered some severe domestic calamity owing to it. Each of these circumstances may be entitled to more or less weight in the enquiry whether, when the existence of any of them is established, the particulars were furnished in a reasonable time. It is true, as was said by *Littledale, J.*, in *Facey v. Hurdom*, "reasonable time may sometimes be a question for the judge when the facts are found by the jury," but that observation was made in reference to the case of *Darbishire v. Parker*, (6 East 3,) where the question was whether notice of dishonour of a bill of exchange was sent in proper time to the drawer, and the question of the sufficiency of notice has always in such cases been deemed a question of law. But numerous cases establish that in the absence of some rule of law, or some established practice adopted by the courts with a view to commercial dealings, the jury are left to determine not only the facts, but to draw the conclusion whether, under the circumstances, the act required was done in a reasonable time. Thus, in *Graham v. The Van Diemen's Land Co.*, (11 Ex. 112,) *Coleridge, J.*, said, "Reasonable time, in the absence of any rule of law applicable to this particular subject, is a

question for the jury, if there be any facts for their consideration." And in *Goodwyn v. Cheveley*, (4 H. & N. 631,) which is the latest decision I have seen upon the point, the court held that, under the circumstances of that case, the question of reasonable time was not one of law, but one of fact to be determined by the jury.

We are not called upon to say whether we think the finding of the jury was sustained by the evidence, but whether the facts were of that nature that the moment they were known the learned judge who tried the cause should have decided, as a question of law, whether the "particular account" was given within a reasonable time or no.

We agree that the proofs furnished and put in evidence at the trial of the first action were insufficient, but nevertheless the defendants, though they gave notice on the 10th of July, 1858, of the insufficiency of the papers served on them before that date, received other and additional documents intended to supply the defects within a few days afterwards, and kept them without objection. Now a jury might conclude—if the delay to put the proofs into that shape which a strictly legal construction of the condition required, and which for the purposes of this argument we may assume was done, arose from the conduct of the defendants, in objecting promptly and properly to the first, and retaining the last without observation or suggestion of insufficiency—that the defect, when made manifest, was supplied within a reasonable time under the particular circumstances. In this case the defendants desired at the trial of the first action to give in evidence what they set out in their fourth plea, but could not in the then state of the record. A suggestion was afterwards made by the court *in banc* as to waiving all but this defence, which charged the plaintiffs with arson, to which suggestion the plaintiffs raised no objection then, though they had refused to allow this matter to be gone into at the trial. I am not prepared to say all these facts might not have been submitted to the jury as relevant to the question of reasonable time, and if they had been that question must have been left entirely open to them, without the presiding judge laying down a rule of law decisive of the question, for I apprehend there is none.

It is true only a part of these circumstances were before the jury at the last trial, but it did appear that an objection was promptly raised to the first papers delivered by the plaintiffs to defendants: that a second set was shortly afterwards delivered; and that, so far as was shewn, the plaintiffs had no reason to know that any objection to their sufficiency would be urged until after the first action was brought. Whether these facts sufficiently excused the delay that took place in supplying the proofs, &c., now relied upon, is not the point in dispute, but whether these facts made the question one for the jury as of fact, and not for the court as of law; and on a consideration of the authorities we think it was properly submitted to the jury.

It remains only to consider the third question, which embraces the third and fourth grounds of appeal.

We do not feel it necessary to add any thing to what was said by the Chief Justice of the Queen's Bench on these points. We concur with the judgment rendered.

In our opinion the appeal must be dismissed with costs.

Appeal dismissed.

DAFOE V. RUTTAN, SHERIFF.

Interpleader order—Release of goods by sheriff—Action therefor—Order set aside—Pleading.

The declaration complained that defendant, as sheriff, under a *fi. fa.*, at the plaintiff's suit, levied upon a certain quantity of bricks *made by F.*, one of the defendants in the writ, whereupon one B. claimed them, and an interpleader order was made directing an issue, and that until payment into court of the value of the bricks, or security given therefor, defendant should continue in possession; yet that, though the money was not paid, nor security given, defendant wrongfully allowed the bricks to be removed by B. Defendant pleaded that the interpleader order was duly set aside; to which the plaintiff replied that the order contained a clause protecting the defendant against action, and that it was not set aside for informality, but at the plaintiff's instance, long after the defendant had allowed the goods to be removed, and to enable the plaintiff to bring this action.

Held, on demurrer to the replication, affirming the judgment of the county court, that the declaration was bad, for not averring that the bricks belonged to F., and that the replication was also bad, being no answer to the plea.

APPEAL from the county court of Hastings.

The first count of the declaration was for a false return

of *nulla bona*, made by defendant to a *fi. fa.* on a judgment obtained by the plaintiff against two defendants, William H. Fox and John Weaver.

Second count—That after the recovery of the said judgment, and whilst the said writ of *fi. fa.* was in the now defendant's hands in full force for execution, he did by virtue of said writ levy upon a certain quantity of bricks made by the defendant William H. Fox, whereupon one Alexander Buchanan claimed to be the owner thereof as against the plaintiff, the execution creditor, and notified the now defendant to that effect, and the now defendant thereupon, as such sheriff, caused an interpleader summons to issue in the cause in which the said judgment was obtained, calling upon the plaintiff and said Buchanan to shew the nature of their respective claims to the said bricks; and the plaintiff and the said Buchanan did appear thereon, and showed the nature of their claims thereto, and requested an issue to be directed to try the validity thereof, and Sir John B. Robinson, Chief Justice of the Court of Queen's Bench, then sitting in Chambers, did make an interpleader order in said cause on the return of said summons, on the 4th day of September, 1857, by which order it was directed that upon payment into court in the said cause, by the said Buchanan, of a sum of money equal to the value of the bricks seized, or upon the said Buchanan giving satisfactory security to the now defendant for the payment of the said value by him, according to the directions of any rule of court or judge's order to be made in the said cause, the now defendant should withdraw from the possession of said bricks, and that until such payment should be made or security given the now defendant as such sheriff should continue in possession of said bricks. And the plaintiff averred that the said Buchanan never did pay into court the value of the said bricks, or any portion thereof, nor did he ever give the said security to the now defendant as aforesaid, but nevertheless the now defendant did, while he was such sheriff as aforesaid, wrongfully, and in defiance of the said order so made as aforesaid, relinquish the possession of said bricks, and permitted the said Buchanan to take the same out of the possession of the now defendant, and remove the same out of the now defendant's counties.

Plea.—That the said interpleader order in that count mentioned was duly set aside by the Honourable William Buell Richards, one of the judges of the Court of Common Pleas in Upper Canada, having full jurisdiction and power for that purpose.

Replication.—That the said interpleader order contained a clause protecting the said sheriff against action, and that the same was set aside for no informality, but at the instance of the present plaintiff, in order that the action might be brought and proceeded with, and the costs incurred by the plaintiff in and about the said order be obtained, and that the same was not set aside until long after the said defendant had allowed the said Buchanan to remove the bricks out of his the said defendant's counties and possession, and at the time of such removal and giving up of such possession the said interpleader order was current and in full force.

Demurrer.—That the said replication, while confessing the said plea, shows nothing in avoidance thereof: that the said interpleader order having been rescinded is as if the same had never been made, and after it was rescinded no action could be brought or would lie thereon.

Judgment on this demurrer was given in the court below for the defendant, and the plaintiff appealed.

Cameron, Q. C., for the appellant.

Jellett, contra.

ROBINSON, C. J., delivered the judgment of the court.

The learned judge of the county court has not told us on what grounds he gave his judgment in favour of the defendant, but we are of opinion that the defendant ought to have had judgment upon demurrer, for the second count of the declaration states no good cause of action.

It is no where stated in the count that the bricks mentioned in it belonged to the defendants in the execution, but only that they were bricks which Fox, one of the defendants in the *fi. fa.*, had made. That does not amount to an assertion that the bricks belonged to Fox, or were in any manner liable to the plaintiff's execution; and unless they were, the

plaintiff has sustained no damage by their having been delivered up to Buchanan.

On the other ground which is assigned as cause of demurrer, we think the defendant was entitled to succeed, for the replication is no answer to the plea.

The court had ordered the sheriff to continue in possession of the goods, and not give them up to the claimant, Buchanan, without security. That was a proper condition, on which he obtained the advantage of the proceeding by interpleader, and the court could reasonably exact that condition while they were directing the right to be tried at the cost of other parties for his benefit and protection; but when the sheriff was deprived of the benefit of the interpleader at this plaintiff's instance, by the order being rescinded, (doubtless for some good reason shewn by the plaintiff,) the sheriff was obliged to act at his own risk, and could therefore take his own course, being no longer bound to observe the terms of the rescinded order. By keeping the goods from the claimant, if he had reason to think the claimant's title might turn out to be good, he would only have subjected himself to higher damages, against which he had no longer any protection.

Appeal dismissed with costs.

PATON V. BROWNE.

Ships—Mortgage—Estoppel.

B. owning a vessel mortgaged her to C., and C. assigned the mortgage, with his other property, to the plaintiff in trust for creditors. The plaintiff having brought replevin against B. to obtain possession:

Held, that the defendant could not dispute the plaintiff's title, or set up that he was trustee for a foreign corporation who by law could not hold ships.

REPLEVIN for a steamboat called the Europa, with her sails, equipment, &c., laying the detention on the 15th of April, 1859.

Plea, on equitable grounds, that the goods detained were not at the said time when, &c., the goods of the plaintiff, but belonged to certain other persons mentioned in the plea, and were and are a British plantation vessel navigating the

waters of Lake Ontario, and not registered under the imperial statute for registering British vessels; that she is of greater burthen than 15 tons—namely, of 341 tons—and was duly registered, and a certificate of ownership duly granted, according to the statutes in that behalf, at the Port of Hamilton, in Upper Canada, by the collector of Customs there, to which port she belonged, to wit, on the 26th of March, 1856, in the names of the owners, Richard Benner, the defendant Browne, and Thomas N. Best, trustees elected by the Europa Steamboat Company.

That neither the said vessel, nor any property in her, had ever been sold and transferred by any sufficient bill of sale or instrument in writing by the said owners to the plaintiff, or any others, Her Majesty's subjects; but on the contrary the plaintiff's sole pretence of ownership of such vessel was as assignee for the benefit of the creditors of a certain mortgagee of such vessel, to wit, one Coleman, who claimed solely through a mortgage made on the 2nd of June, 1856, by Benner, Browne, and Best, as trustees, to Coleman, of said vessel, as security for a debt then claimed by him, and which indenture of mortgage some of his creditors (afterwards mentioned in this plea) claim by virtue of a certain composition made before the commencement of this suit, by agreement between the said Coleman, his creditors, and the plaintiff, in writing, and acted upon by all those parties, whereby the plaintiff ceased to be the assignee of the said Coleman for the benefit of his said creditors, such creditors, at the request of the said Coleman, and the plaintiff, dividing amongst themselves, and taking their respective shares on such division of the trust property so assigned to the plaintiff, in full satisfaction and discharge of all their claims against the said Coleman, concerning which the said plaintiff was such assignee and trustee.

The plaintiff replied to this equitable plea, admitting that Benner, Browne and Best were, before the making of the said mortgage, the owners of the said vessel, goods, &c., and were trustees as in the plea alleged, but setting forth that by the mortgage of the 2nd June, 1856, in the plea mentioned, the said three trustees, including this defendant, did

assign the said vessel, &c., to the said Coleman, for securing the payment by the said trustees to him of the debt referred to in the plea: that such mortgage was duly registered at the custom-house, according to the Statute, at Hamilton: that default was made in paying the debt, and that afterwards, namely, on the 1st of May, 1857, by indenture made between Coleman and the plaintiff Paton, Coleman assigned the said vessel, &c., to the plaintiff, which assignment was duly registered at said custom-house; that although it is true that the plaintiff held the said steamer and other goods, as assignee thereof, for the benefit of the creditors of Coleman, as in the plea mentioned, and that the said creditors made afterwards a division of the said trust property among themselves with the consent of Coleman and the plaintiff, yet the plaintiff had not conveyed or assigned the said steamer, &c., to any person, but held the same as trustee for the Bank of British North America, in respect of a debt long before the time of the said division incurred by the said Coleman to the said Bank in the usual course of their business, and this action was brought with the consent of the Bank.

The defendant rejoined, upon equitable grounds, that the said bank was a foreign corporation, having members thereof who were not subjects of Her Majesty, and were not authorised by the laws of this province, either directly or indirectly, to be the owners or possessed in any manner of the said British plantation vessel: that the plaintiff is not and never was the owner of such vessel, or possessed thereof, but that his pretended trusteeship alleged in the replication was the same mere colourable and unfounded claim mentioned in defendant's plea, and was merely a contrivance between the plaintiff and the said bank to enable the bank to conceal the true state of facts, and to become, contrary to law, in effect the mortgagees of such vessel; and that there was no bill of sale or other instrument containing a recital of the certificate of ownership of such vessel, nor any registration in the proper registry for such vessel of any bill of sale or instrument whereby the plaintiff could or can be possessed of or be the holder of the said vessel as trustee for the said bank, as in the replication alleged.

The plaintiff joined issue on this rejoinder.

The trial took place at Hamilton before *Robinson, C. J.* There was tried at the same assizes an action brought in the Court of Common Pleas, at the suit of this plaintiff, Paton, against Foy, (a) and it was agreed at the trial of this case that a verdict should be entered for the plaintiff, reserving leave to the defendant to move to have a verdict entered in his favour upon any legal objections that might be taken upon the evidence given in that case, which it was agreed should be received and considered as if given in this present case, and applied to the pleadings therein; and besides the evidence given in Foy's case, a deed was upon this trial put in, dated 26th December, 1857, executed by Coleman, the object of which was to remove any objection to the other assignment before made by Coleman to Paton, on the score of preference, by directing a general distribution among all Coleman's creditors.

Martin moved to enter a verdict for defendant, on the ground that the plaintiff being only assignee of the mortgagee of the vessel, which had been registered under our statute 8 Vic., ch. 5, was not even at common law the owner, and the mortgagors (the trustees) continued to be notwithstanding the owners of the vessel, wherefore replevin does not lie against the defendant, at the plaintiff's suit: that the evidence and the admissions by the plaintiff in the pleadings, shew that before this action the plaintiff had ceased to be the assignee of the mortgage under which he claims, and that before and at the time of the commencement of this suit the plaintiff had no right to or interest in the vessel, and if any, only as trustee for the Bank of British North America, a corporation not capable by law of becoming owners or possessors of vessels. He cited *Consol. Stats. C.*, ch. 41, sec. 23; *Watkins v. Corbett*, 6 U. C. R. 887; *Orser v. Mounteny et al.*, 9 U. C. R. 386; *Bank of British North America v. Browne*, 6 U. C. R. 493; *McDonald v. Bank of Upper Canada*, 7 U. C. R. 295.

Freeman, Q. C., shewed cause, and cited *Dean v. McGhie*, 4 Bing. 45. *Kerswill v. Bishop*, 2 Cr. & J. 529; *Dickinson v. Kitchen*, 8 E. & B. 789.

(a) See the case reported 9. C. P. 512.

ROBINSON, C. J., delivered the judgment of the court.

We have considered this case, and are of opinion that there is nothing in the objections taken that should prevent the recovery of the plaintiff. It is a plain case of a mortgage given upon the *Europa* by Benner, Browne, and Best, her registered owners, to Coleman, in security for a large sum of money advanced by him to equip the vessel and pay debts due on her account.

Then Coleman, having himself become largely indebted, assigned the mortgage to the plaintiff, Paton, with his other property, for the benefit of his creditors; and Paton, the assignee, is suing the defendant to gain possession of the vessel, under the mortgage.

Browne, the defendant, cannot be allowed to dispute the title of his mortgagee, Coleman, nor of this plaintiff, Paton, derived under the mortgage which Browne gave to Coleman, nor can he be allowed to enter into any question of the validity of a trust which Coleman, or the plaintiff, the present holder of the mortgage, has created or attempted to create for the benefit of third parties. All that is nothing to him. He is bound to give up the possession of the vessel to the holder of the mortgage which he gave upon her.

Rule discharged.

MOFFATT ET AL. V. COULSON.

Chattel mortgage—Insufficient description—Purchaser with notice.

A chattel mortgage not containing a sufficient description of the goods is void as against subsequent purchasers in good faith, and notice of such a mortgage to the purchaser will not affect his right.

TROVER for two horses.

Pleas:—1. Not guilty. 2. That the property was not the plaintiffs'.

At the trial, before *Burns, J.*, at Stratford, the facts appeared as follow:—two persons of the name of John Neelan and Robert Eaton carried on business together at St. Mary's, and on the 26th of March, 1858, they executed a chattel mortgage to the plaintiffs, to secure them in the sum of \$2,800, to be paid to the plaintiffs in six months

after date. Among the rest of the property mentioned in the deed of mortgage were "two horses." Nothing was stated as to age, colour, or marks of any kind, or where they were to be found; indeed nothing whatever to enable any one to distinguish them in any way from any other two horses in the county. The deed was duly filed in the office of the clerk of the county court, and no objection made to the validity of the instrument for want of any thing upon that ground. The money was not paid at the day, and after that Neelan, one of the partners, retired from the firm, and a brother of Robert Eaton joined him, on condition that the creditors of the former firm would extend the time of payment for the debts the firm owed. On the 23rd of November, 1858, the plaintiffs wrote to the firm of the Eatons thus: "We shall be willing to give you three years to pay us the amount due by Neelan and Eaton, payable in equal quarterly instalments with interest, the first payable in the month of March next, provided your other creditors will give the same time." James Eaton, the brother who joined the firm, stated that he had an interview with Mr. Moffatt, one of the plaintiffs, on the subject of extension of time, and as to mode of payment, and at that time he said he told Mr. Moffatt they were thinking of selling the horses. Mr. Moffatt neither made any objection nor gave any assent, but asked what they were worth, to which James Eaton replied that he could not say. At that time James Eaton swore they were making some payments to their creditors, and having \$220 of money in hand, he paid that sum to Mr. Moffatt, and he supposed after that they might sell the horses and appropriate the proceeds to other creditors. The horses, together with a waggon, sleigh and harness, were sold by the Eatons on the 13th of December, 1858, to the defendant, for \$250, and that money was not paid to the plaintiffs, but the Eatons appropriated it otherwise. Robert Eaton effected the sale to defendant, and he said he did not tell Coulson of the mortgage or speak of it at the time, and his reason for not doing so was that he thought that his brother had so arranged with the plaintiffs that they no longer

had any claim under the mortgage. Another witness stated that the defendant told him he was aware of the mortgage to the plaintiffs at the time he bought, but he thought that either by expiration of the mortgage, or by some arrangement made with the plaintiffs, Eaton had a right to dispose of the horses.

There was a question whether one of the horses mentioned in the mortgage had not died after the execution of it, and whether one of the two sold to the defendant had not been bought afterwards to supply the place of the other.

The defendant's counsel objected that the property was not sufficiently described in the deed of mortgage to pass it to the plaintiffs under the Chattel Mortgage Act.

On the other hand, the plaintiffs contended that the defendant was not in a situation to urge that point; that the deed was good as against Eaton, who could not be heard to dispute the description, and the defendant having purchased with knowledge of the mortgage was not a vendee in good faith, and was in no better situation than Eaton himself would be.

The learned judge reserved leave to the defendant to move to enter a nonsuit, and left the question to the jury. The jury found for the plaintiffs for the value of one of the horses, £30.

John Wilson, Q. C., obtained a rule *nisi* to set aside the verdict and enter a nonsuit, or for a new trial, on the ground that the horses were not sufficiently described in the chattel mortgage under which the plaintiffs claimed.

Read, Q. C., shewed cause, and contended that the statute 20 Vic., ch. 3, makes chattel mortgages void where there is no sufficient description of the property contained in them, yet that they are only void against creditors and purchasers for valuable consideration in good faith, and that the defendant being aware of the plaintiffs' mortgage could not be considered a purchaser in good faith. He cited *Doe Otley v. Manning*, 9 East 59; *Sanger v. Eastwood*, 19 Wend. 514; *White v. Cole*, 24 Wend. 117; *Wilkinson v. King*, 2 Camp. 335.

C. Robinson supported the rule, and contended that a mortgage which does not contain a sufficient and full description of the goods mentioned therein, so that the same may be thereby readily and easily known and distinguished, as required by the 4th section of 20 Vic., ch. 3, though not declared void by that section, must be void under the other clauses of the act as against subsequent purchasers for value.—*Rose v. Scott*, 17 U. C. R. 385; *Wilson v. Kerr et al.*, ib. 178; and that, though such purchasers may have had notice of a previous invalid mortgage, their purchase cannot be affected by it. He cited *Edwards v. English et al.*, 7 E. & B. 564, as shewing that a mortgage of goods duly made and filed within the proper time, but void as against creditors because not accompanied by a proper affidavit as required by statute, cannot affect the interest of a second mortgagee of the same goods.

ROBINSON, C. J.—There was no description whatever of the two horses mortgaged by which they could be “readily and easily known and distinguished” from any other two horses. The effect of that, I think, is to make the mortgage of them absolutely void as against a subsequent purchaser in good faith, for the fourth clause of the Chattel Mortgage Act, 20 Vic., ch. 3, is to be read in connexion with the preceding clauses, and thus the particular description which it exacts is made to form one of those requisites which must be found in all chattel mortgages, to enable them to bind the goods by virtue of registration only where there has been no immediate and continued change of possession.

The only question, then, is whether this defendant should be held to be a subsequent purchaser in good faith, within the meaning of the second section, in which case only he would be entitled to hold against the mortgage, in consequence of the defective description of the horses. I think he should be so held, for there seems to be no reason to doubt upon the evidence that he bought in good faith, in this sense, that he paid a fair consideration for the horse which is in question, and did not buy him collusively, in

order to assist the mortgagors in placing him out of the plaintiffs' reach. The only question is as to the effect of the evidence given of the defendant being aware of the mortgage before he bought. That evidence was not very precise, for it amounted to nothing more than that an intimation was received by the defendant of the prior mortgage in a conversation with a third party; but at any rate I think the notice of the existence of a mortgage insufficient to pass the property would not make the defendant a purchaser in bad faith. I refer to *Doe Otley v. Manning*, (9 East 71,) and to the observations of Roberts in his treatise on fraudulent conveyances, page 39, in this respect. The defendant, I think, although he may have known that Neelan and Eaton had made a mortgage to the plaintiffs of two horses, having at the same time these two horses in their possession which are the subject of this action, but of which no description of any kind was given in the mortgage, was as much at liberty to buy them, seeing them still in their possession, as he would have been if the mortgage had not been filed, or had been filed without an affidavit such as the act requires. In our Registry Laws, the words "purchaser for valuable consideration," have never been held by courts of common law to exclude purchasers with notice of the unregistered conveyance. These two horses not being in any manner described in the mortgage, so that they could be identified, it is the same thing, I think, as if there had been no horses inserted in the mortgage, in which case the defendant might have bought them without doubt, and could not have been liable to have his right defeated, by proof that he had been told it was intended to insert them.

I think the rule should be made absolute for nonsuit.

MCLEAN, J.—I think the case of *Edwards v. English*, (7 E. & B. 564,) cited for defendants on the argument, is very strong, and goes far to establish that the purchase of the defendant, with full notice of the prior invalid mortgage, cannot be defeated on that account. The plaintiffs must claim on the strength of their own title, and that being by

mortgage, unless it contains all that the statute prescribes can confer no title. There is no description whatever of the horses in the plaintiffs' mortgage by which they could possibly be known or distinguished, and as that is made essential by the statute, I think the plaintiffs' title fails, and that a nonsuit should be entered.

BURNS, J., concurred.

Rule absolute for nonsuit.

CARRALL V. POTTER.

Sale of Goods by Sheriff—Guarantee—Effect of on time for payment—Executions—Attachments—Priority.

The sheriff held several executions against one P., on which no seizure was made until after he had absconded and several writs of attachment had issued. After the attachments an execution came in at the suit of defendant, and the sheriff then seized P.'s goods under all the writs, and defendant at the sale purchased a large quantity of lumber. The sheriff would not allow him to take it away without paying; but defendant contended that his execution was entitled to priority over the attachments, and that as other goods had been sold sufficient to satisfy the previous executions, he was himself entitled to the money. An application was then pending by one of the attaching creditors against defendant's judgment, which it was thought would determine the question of priority, and the sheriff agreed to let defendant take the lumber on receiving a guarantee from the Bank of British North America that they would be responsible for the payment when and if it should be decided that the sheriff was not entitled to apply the proceeds of the sale on account of defendant's execution. Afterwards the sheriff returned the defendants writ, *nulla bona*, for which an action was brought against him by this defendant, and a verdict recovered for more than the amount payable for the lumber.

Held, that the sheriff was entitled to recover from the defendant the purchase money for the lumber, without waiting until the question of priority between his writ and the attachment had been decided, for that condition applied only to the liability of the bank under their guarantee.

As to the question of priority, see *Potter v. Carrall*, (9 C. P. 442, the suit for the false return above referred to,) commented upon in this case, and which now stands for judgment in the Court of Appeal.

Per Robinson, C. J., the defence that the time of payment had not arrived by the terms of sale was clearly admissible under the general issue.

The plaintiff was sheriff of the county of Oxford.

First count, for goods bargained and sold, and for money due and payable by the defendant to the plaintiff.

Second count, that on the 1st of September, 1858, the plaintiff, being sheriff of the county of Oxford, had seized and taken in execution, and also into his charge and keeping,

divers goods and chattels, (enumerating them,) of one Charles Pickle, under and by virtue of divers writs of *fi. fa.*, and by virtue of divers writs of attachment; and thereupon the plaintiff exposed the said goods for sale at public auction under the writs of *fi. fa.* and attachment, and the defendant became the highest bidder, and in consideration thereof the plaintiff, as such sheriff, at the defendant's request, sold the goods to the defendant, and the defendant promised to pay £770 17s. 3d., and although the time for payment hath passed, yet the defendant hath not paid the amount.

Pleas.—1. Never indebted. 2. To the last count, that the defendant did not promise as alleged.

At the trial, at Woodstock, before *Burns, J.*, the facts appeared as follows: a person of the name of Charles Pickle carried on a large lumbering establishment in the county of Oxford, and sometime in July, 1858, two executions came into the sheriff's hands against his goods and chattels. These amounted to about £750, and thereupon Pickle paid £200, and after that he absconded, not having paid the residue of the executions. Immediately afterwards various creditors sued out attachments against the property of Pickle, and placed them in the sheriff's hands, and after that the defendant sued out an execution upon a judgment he had obtained a year before that time, and placed that writ also in the sheriff's hands. The defendant's execution was endorsed to levy upwards of £2000. The sheriff advertised all the property for sale upon all the different writs, the *fi. fas.* and the attachments, according to the order in which they had been received. This sale was postponed till the month of December, 1858. In the meantime the Commercial Bank, one of the attaching creditors, attacked the defendant's judgment, and applied to the Practice Court to set it aside. Those proceedings were pending sometime before being disposed of, and finally the Commercial Bank failed in the application. The attaching creditors considered that they had a priority over the defendant's execution, but all parties were desirous that the property should be converted into money. It was arranged between the defendant and the deputy sheriff, that if the defendant produced a guarantee

from the Bank of British North America, he might buy what lumber he liked at the sheriff's sale, and should not be called on to pay for it till it was ascertained whether or not the defendant's execution would hold the goods, and if it would, then the defendant might retain the amount of his purchase upon his own execution. The deputy sheriff stated that at that time the defendant and he both thought the application then made on behalf of the Commercial Bank would determine the priority between the attachments and the defendant's execution, but it was found afterwards that it could not. All that it determined was that the defendant's judgment should not be set aside.

At the sheriffs' sale lumber enough was bought by other parties to discharge the executions prior to the defendant's, and then he purchased enough to amount to the sum of £790 17s. 1d., and before the deputy sheriff would allow the defendant to remove it, a guarantee from the manager of the Bank of British North America, at Brantford, was furnished, as follows :

Brantford, Dec. 6th, 1858.

JAMES CARRALL, ESQ.,
Sheriff of Oxford.

DEAR SIR,—If you will deliver to Mr. Potter the lumber purchased by him at sale of Pickle's property, amounting to about three thousand one hundred dollars, the Bank of British North America will be responsible to you for the payment of the same, when and if it shall be decided that you are not entitled to apply the proceeds of this sale on the execution in your hands of *Potter v. Pickle*, in the order and to the effect it now stands in your hands.

Yours, &c.,

J. C. GEDDES,
Manager B. N. A. Bank, Brantford.

At the foot of the guarantee the defendant wrote as follows :

JAMES CARRALL, ESQ.

DEAR SIR,—Above you will find guarantee of payment of lumber bought at Pickle's, provided this case goes against me. On receipt please write me if I can commence taking lumber away, as several teams are ready to draw. Mr. Ross understands the above.

Yours truly,

E. H. POTTER.

Upon this being received by the plaintiff, his deputy wrote to the defendant as follows :

SHERIFF'S OFFICE,

Woodstock, Dec. 11, 1858.

DEAR SIR,—I am in receipt of yours of the 9th inst., and in reply would say, that you have done on your part all that I asked of you to do, in getting the Bank to be responsible for the lumber bought by you at the sale of Pickle's property ; therefore you can remove the lumber at any time when it is convenient for yourself to do so.

I am, yours truly,

ANDREW ROSS,

Dep'y Sheriff.

E. H. POTTER, Esq.,
Brantford.

It was admitted that the rule which the Commercial Bank obtained to set aside the defendant's judgment, was discharged in Hilary Term, 1859. Subsequent thereto the plaintiff returned the defendant's writ of execution *nulla bona*, but why he did so, whether indemnified by the attaching creditors or not, did not appear. The deputy sheriff stated that before returning the writ the defendant told him he wished that he should return it ; that he expected nothing from the goods, and wished to get at Pickle's lands. In August, 1859, the plaintiff applied to the defendant for payment of the lumber he had purchased, and the defendant refused to pay, on the ground that it had not been determined whether the defendant's execution would have priority over the attachments. The defendant resisted this action now upon that ground. He brought an action against the plaintiff for a false return to the writ of execution in order to test that question, and when this suit was tried that action was pending to be tried at the assizes at Brantford. (a)

The plaintiff contended that the effect of the guarantee was, that the bank should not be called on for payment until the question should be determined, but that the defendant was always liable to pay at any time ; and further, that the plaintiff had a right to determine the question himself, by deciding what he would do upon the defendant's writ of execution, and that he had determined it by returning that writ

(a) See the case reported, *Potter v. Carrall*, 9 C. P. 442.

nulla bona, thus leaving it to the defendant to bring his action against the sheriff if he had done wrong.

The learned judge directed a verdict for the plaintiff for the amount of the lumber, £770 17s. 6d., and £46 4s., the interest upon it, in all £817 1s. 1d., and reserved leave to the defendant to move the court to enter a non-suit.

Wood obtained a rule to shew cause why a nonsuit should not be entered, or why there should not be a new trial, on the ground that the evidence shewed that the term of credit had not expired, and because the learned judge should have so directed the jury.

Beard shewed cause. He cited *Salmon v. James*, 1 Dowl. 369; *Smith v. Bacon* 14 U. C. R. 38.

ROBINSON, C. J.—The defence intended to be set up here is one that may undoubtedly be set up under the general issue, namely, that the defendant bought the goods upon a special contract, to be paid for at a certain time not yet arrived, or in a certain manner, and is therefore not liable as upon an implied undertaking to pay upon request. The Court of Queen's Bench had determined otherwise in *Edmunds v. Harris*, (4 N. & M. 182,) and after the new rules of pleading were made, but in *Broomfield v. Smith*, (1 M. & W. 542,) it was decided that in that case the effect of the new rules of pleading had been mistaken, and it has always since been held that a defendant may shew, under the general issue, that the time has not yet arrived when he was to pay for the goods bought, according to the understanding on which he bought them.

Upon the whole evidence given at the trial, I think what the defendant set up as his defence was a matter applying rather as between the Bank of British North America and the sheriff, than as between the sheriff and this defendant. It might very well be that the bank, being called upon to give their guarantee, declined to do so to any greater extent, and in any other manner than they did: that is, that if it should turn out that the money could not be applied upon the defendant's executions, but received by or paid to the Commercial Bank, they would then see that the

money should be forthcoming. The bank might have taken advice upon the legal question pending, and feeling confident that the Commercial Bank would not succeed in what they were contending for, they may have been willing to give their guarantee upon that chance, and of course they could not be called upon until the point in litigation between the Commercial Bank and the defendant, had been finally settled, for that was the effect of their undertaking. This, however, did not apply to the state of things as between Potter and the sheriff, and had not necessarily the effect of staying the recourse of the sheriff against Potter for the price of the lumber which Potter had bought at the sale until it should be determined whether the sheriff should ever be in a situation to enforce his guarantee. That question might be long undetermined, from various causes, and, in the meantime, it might happen in such a case that the circumstances of the party giving the guarantee might change, so as to make it of little or no value, and the effect might be hard and unjust upon the sheriff, if he should be held disabled from proceeding against the purchaser of the goods until his right to look to the guarantee should be finally determined. He might in that case be worse off than if he had taken no security. Of course it might have been expressly agreed between the sheriff and Potter, that Potter should not be called upon to pay the claim till the claim of the Commercial Bank should have been disposed of, and there was some evidence to that effect; but all that seemed then to be in the contemplation of Potter and the deputy sheriff, with whom that arrangement took place, was that the plaintiff might buy the lumber at the sheriff's sale, and that the matter might stand until it was seen what should become of the attempt made by the Commercial Bank to set aside Potter's judgment and execution as being fraudulent, or not *bonâ fide*.

It does not appear to me that enough was proved to make it clear that the sheriff was to wait upon Potter for the price of the lumber, which the sheriff had allowed to go into his hands, until all questions, not merely about the validity of Potter's judgment, but about priority between the several executions and the attachments, should be finally disposed of.

The action which Potter had brought in the Common Pleas against the sheriff, for falsely returning *nulla bona* to his writ of *fi. fa.* against Pickle's goods, was tried at Brantford, soon after the case had been tried at Woodstock, and it was reserved for the court to determine in the following term, whether the attachment creditors of Pickle, or Potter claiming under his *fi. fa.*, were entitled to priority. Judgment has been given in the case in the Common Pleas, the effect of which I take to be that the executions which came to the sheriff before the attachments were of course to be first satisfied out of the absconding debtor's goods, but that after these, and before the attaching creditors, Potter had a claim to be satisfied.

As it is stated in the case that Potter's action had not been commenced by service of process upon Pickle before any of the attachments had been sued out against him, this decision seems to be at variance with what had been determined by us to be the effect of the 55th clause of the Common Law Procedure Act of 1856, in *Daniel v. Fitzell et al.*, (17 U. C. R. 369.) There was a difference of opinion upon the point among the judges of the Court of Common Pleas, as appears from the report of the case in the *Upper Canada Law Journal*, (Vol. vi., p. 42,) and the judgment has been appealed from. (a)

In the meantime I think the evidence in that case was not such as to shew that the sheriff was not entitled to succeed upon the issue; and it will be open to the defendant to move to stay the money, that may be paid in under the judgment in this case, in the sheriff's hands, till the rights of the execution creditors of Pickle among themselves shall have been determined.

I do not think we should be warranted in obstructing the sheriff's recovery against Potter, for the sum paid by him for the goods which he purchased at the sheriff's sale. Besides other considerations in the case, which I have mentioned, the fact sworn to, of Potter having desired the sheriff to return *nulla bona*, should be taken, I think, as an admission by him for the purpose of this action that the money

(a) See the case in the Common Pleas now reported, 9 C. P. 442. There was in fact no difference of opinion, and the error is corrected in the next number of the *Law Journal*.

which the sheriff had made from the sale of Pickle's goods, did not belong of right to him, but to others. I think the plaintiff's verdict should stand.

MCLEAN, J.—There is nothing in the guarantee given by the agent or manager of the Bank of British North America to prevent this action being sustained. That instrument only makes the Bank responsible if it should be decided that the plaintiff was not entitled to apply the proceeds of the sale of Pickle's goods in payment of the execution in his hands in favour of defendant, in the order in which that execution stood with reference to the attachments. That undertaking did not relieve the defendant from any liability which rested on him to pay for the goods which he had purchased; the only effect which it seems to have had was to enable the defendant to get possession of the lumber, which otherwise he probably could not have done.

As it appeared doubtful whether the attachments or the defendant's execution would be entitled to claim priority in payment, the defendant required security, before he consented to give up the lumber, that in case the defendant should not be entitled to any portion of the proceeds the amount should be forthcoming to be paid over to those who were entitled, and that security is furnished by the undertaking of the Bank manager. The right of the plaintiff to maintain this action is not, however, affected by it. That must depend upon the terms of sale. If the defendant was induced to purchase on the assurance and undertaking of the deputy sheriff, that he should not be called upon to pay for the lumber till it was decided in law whether the amount could be applied on his execution, and it was understood that it should be so applied if the defendant was entitled to priority, then the defendant ought not to be called upon in this action to pay the plaintiff money which he may be entitled to have refunded to him by the plaintiff whenever the question of priority is decided. But it may be said that the defendant's execution being returned *nulla bona*, the defendant cannot be entitled to have applied on it moneys which have been made on the other writs. Still, if the return of

nulla bona is decided to be a false return, the defendant can and will recover, in the action for such false return, an amount as great as what he would have been entitled to from the plaintiff, if he could legally claim a portion of the proceeds of Pickle's goods as being made under his execution; and in that case it would seem desirable that his right under his execution should be decided before he is called on to pay over the amount of his purchase, an amount which he may ultimately be found entitled to retain. The defendant might have applied to the court to stay proceedings in this suit, and to have the amount claimed from him applied on his execution as so much made under it, and whether such application were entertained or not, the question would probably be decided as to the right of precedence between the attachments and his execution. The defendant, in his action for a false return, has obtained a verdict against the plaintiff for a much larger sum than the amount of his own purchase at sheriff's sale, which verdict the Court of Common Pleas have refused to set aside, as appears by the proceedings in appeal in that suit. The plaintiff, then, is entitled to proceed for a cause of action which he could not set off in any way against the defendant's claim for damages in the suit for a false return, and unless allowed to recover he may be compelled to pay the full amount of defendant's verdict, though no part of the defendant's purchase money has been paid.

By the 19 Vic., ch. 43, sec. 49, it is provided, that the sheriff to whom any writ of attachment is directed shall forthwith take into his charge or keeping *all* the property and effects of an absconding debtor, according to the exigency of the writ, and shall be allowed all necessary disbursements for keeping the same. In this case it was shewn that the plaintiff had several executions in his hands, which bound the goods of Pickle, before any attachments came in, but that no levy had been made till after two attachments were received. That *then* a seizure was made under the *fi. fas.* and the attachments, and Pickle's property and effects taken into the charge and keeping of the plaintiff, and subsequently sold. If no other *fi. fas.* or attachments had

come into the sheriff's hands, I take it there could be no doubt that the attaching creditors, on obtaining judgment, would have been entitled to any surplus arising from the sale of the goods beyond the amount of the executions. The sheriff could not be allowed to say that, because the proceeds were first applicable to the executions which bound the goods, no portion could be applicable to the attachments, though the seizure of the goods was as well under the attachments as under the executions. When an attachment is received by the sheriff, he is required by law to take *all* the property and effects of an absconding debtor into his custody, and the reason for that is that other attaching creditors may take proceedings and come in within six months, and become entitled to share in the proceeds of the property and effects seized, so that all may be required to meet the demands. The plaintiff was therefore obliged to take *all* the property of Pickle upon the attachments, but on the executions a portion of the goods would have been sufficient to cover the amount to be levied. Then as *all* the property was taken, and was in the plaintiff's hands, first to satisfy the executions, and then to satisfy the judgments and executions which should be recovered on proceedings under attachments, was the defendant entitled to have his *fi. fa.* (which was received when only two attachments were in the sheriff's hands) satisfied from the proceeds of the goods in preference to the parties who took out subsequent attachments?

The 55th section of 19 Vic., ch. 43, would entitle the defendant to proceed and sell the property attached in the same manner as if it remained in the hands of Pickle, notwithstanding the prior attachments, if the defendant's suit had been commenced and *the process* therein *served* before the suing out of the attachments, but it is admitted that no process was at any time served on Pickle at the suit of the defendant, and that the judgment was entered on a *cognovit* given without any suit being previously instituted. That section, therefore, does not give the defendant a right to have his execution satisfied in preference to the attachments. Then, under the 57th section of the act, it is provided, that

when several persons sue out writs of attachment against an absconding debtor, the proceeds of the property and effects attached, and in the sheriff's hands, *shall be rateably distributed* among such of the plaintiffs in such writs as obtain judgments and sue out executions, in proportion to the sums actually due on such judgments, and the court or a judge may delay the distribution in order to give reasonable time for the obtaining of judgment against such absconding debtor.

The defendant's suit not being commenced by service of process, and no right being reserved to him under the statute to proceed against property seized under attachment, the proceeds must, under the 57th section, be distributed amongst the attaching creditors who have obtained judgments and sued out executions, in proportion to the sums actually due upon the judgments; and as the plaintiff will be bound so to distribute it he must be at liberty to recover the amount due by the defendant, in order to its proper distribution. I do not think, however, that he can recover interest. If he were bound to pay interest, then it would perhaps be just that he should be at liberty to claim and recover interest. As however a sheriff is not liable to pay to the creditors any amount but what he has actually realized from the sale of property after payment of all costs, and he cannot have any personal interest in money collected on executions, I do not think the plaintiff entitled to interest on the amount due by defendant, and therefore the amount of interest must be deducted from the verdict.

BURNS, J., concurred.

Rule discharged.

McMILLAN V. HUGH RANKIN, REUBEN SPOONER, PATRICK DALY, AND JAMES SWIFT.

Schools—Rate levied by trustees—Voluntary subscriptions.

The freeholders and householders of a school section cannot substitute a voluntary subscription among themselves, for the expenses of the school, instead of the provisions made by law; and a resolution to have such subscription, and that the trustees neglected to collect it, is therefore no answer to an avowry for a rate levied by them in the usual way.

The question to be determined in this case arose upon

demurrer, and the pleadings, which it is unnecessary to give at length, were in substance as follows :—

The plaintiff brought replevin for a cow and calf.

The defendant, James Swift, as collector of school section number 14 in the township of Kingston, made cognizance under a warrant dated the 31st of May, 1858, from the other defendants, Hugh Rankin, Reuben Spooner, and Patrick Daly, as school trustees of said section, for a rate assessed and directed to be levied by them for the salary of the teacher and repairing the school house. And the other defendants, the trustees, avowed separately for the same cause.

The plaintiff pleaded to each cognizance, in separate pleas, that before the taking, namely, on the 13th of January, 1858, at the annual school meeting of the freeholders and householders of said section, it was resolved and decided upon by the majority present that the salary of the teacher, and all expenses connected with said school, should be raised and provided for by voluntary subscriptions of the freeholders and householders of said section: that £50 was then subscribed, and the defendants were informed thereof, and the list delivered to them to collect; and thereupon it became the duty of the trustees, before the making of said rate and warrant, to cause the defendant Swift to collect the said subscriptions; yet that the said trustees, neglecting their duty, and the decision and desire of the said majority, which it was their duty to carry out, did not collect the said subscriptions, but wrongfully made the said assessment and warrant.

The defendant Swift, and the other defendants, the trustees, replied, respectively, to these pleas, that the said resolution and decision was in the following words :—

Resolved, that the expenses of this school section be paid by voluntary subscription, and the balance to be raised from a tax to be levied upon the parents and guardians of those sending children to the school:

that there was no other decision whatever as to the manner in which the teacher's salary and the other expenses connected with the school should be provided for: that the

whole amount subscribed voluntarily, under the said resolution or otherwise, was £2 2s. 6d., which could not be collected, and would have been wholly insufficient, wherefore the rate in the said cognizance mentioned was duly imposed by the said trustees.

The plaintiff rejoined, to each replication, that he was not the parent or guardian of any child sent to the school, and that a tax could not be lawfully levied upon him in respect of the balance of the expenses of such section after said voluntary subscriptions, according to the terms of the resolution; and that for this, as well as for the reason mentioned in the plea, the said rate was unlawfully imposed.

Defendants demurred, on the ground that the plaintiff being a freeholder and householder of the section was liable to the rate, and was not exempt by reason of his not being such parent or guardian: that the mode of raising the balance of the expenses of said section provided by the resolution was insensible and illegal: that the trustees could not legally carry out said resolution; and that what was provided by it being insufficient, they were justified in levying the amount by rate on all the freeholders and householders of the section.

Richards, Q. C., for the demurrer. *Eccles*, Q. C., contra. 13 & 14 Vic., ch. 48, sec. 6, sub-sec. 4, sec. 12, sub-secs. 4, 7, 9; 16 Vic., ch. 185, sec. 13, were referred to.

ROBINSON, C. J., delivered the judgment of the court.

We were not referred to any provision in the school acts, and we can find none, which authorises the freeholders and householders inhabiting a school section, at the general school meeting in January to pass a resolution to substitute a voluntary subscription among themselves, for all school purposes, which must be accepted and relied upon in lieu of all the provisions made by law for defraying such expenses; nor do we find any enactment which makes it the duty of the trustees, or gives them authority, to enforce payment of any such sums voluntarily subscribed; and without this being shewn, it is impossible to contend that the authority of the trustees and municipality to provide and collect funds

is superseded by the mere fact of any such voluntary subscription having been made, which did not end in the necessary funds being produced.

Then, also, the resolution on which the plaintiff relies, as authorising the voluntary subscription, is set out by the defendants, and it is not denied that it is set out truly, and nothing could be more absurd than that resolution, for it expresses that the expenses of the school section (that is, all the expenses) shall be paid by a voluntary subscription, and yet that *the balance* shall be levied upon the parents and guardians of those sending children to the school. They meant no doubt to say, upon the parents and guardians of the children sent.

The only question, therefore, is whether the defendants have in their avowry shewn a legal authority for the rate: we mean, whether the trustees have, so far as they are concerned; for although they may have proceeded illegally, it may not therefore follow that the collector would be a trespasser in consequence of any thing illegal being done, which did not appear on the face of the warrant.

The school trustees rely upon a rate made by themselves, and for all that appears of their own authority given to them by law, for paying teachers' salaries, and for the repairs of the school house. We see no room for doubt that they had authority to levy such a rate under the 7th subsection of the 12th section of the 13 & 14 Vic., ch. 48.

Judgment, in our opinion, must be given for defendants upon the demurrer.

Judgment for defendants on demurrer.

During this term the following gentlemen were called to bar:—ISRAEL NEWNHAM WINSTANLEY, JOHN LEYS, JAMES TILT, ROBERT MORTIMER WILKINSON, RICHARD HENRY HOLLAND, ROBERT WILLIAM ADAMS, EDMUND JOHN SENKLER, JOSEPH DEACON, JOHN MACBETH, ALEXANDER MACNABB, SAMUEL HUME BLAKE, FREDERICK STEWART MACGACHEN, JOHN WEDGWOOD BOWLBY, FEATHERSTON OSLER.

EASTER TERM, 23 VICTORIA, 1860.

Present:

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.
 “ ARCHIBALD McLEAN, J.
 “ ROBERT EASTON BURNS, J.

THE PROVINCIAL INSURANCE COMPANY OF CANADA v.
 JAMES SHAW.

Writ of summons—Service by mistake on defendant's son—Same name.

In an action for calls upon stock subscribed and on promissory notes, the writ of summons, directed to James Shaw, was by mistake served by the sheriff upon his son of the same name, who a few days after gave it to his father, the defendant, telling him that the sheriff had made a blunder; and the defendant, at his son's request, took it to an attorney, who, upon defendant's instructions, entered an appearance, and afterwards put in pleas.

Held, that defendant was sufficiently served, and that the plaintiffs could recover against him.

The defendant, in the first count of the declaration, was sued for calls made upon 100 shares of stock held by him in the plaintiffs' company, and also upon certain promissory notes made by him, payable to the company.

He pleaded that he was never indebted as alleged in the first count, and that he did not make the promissory notes.

The writ of summons in the case was directed to *James Shaw*, of the village of Smith's Falls, in the county of Lanark.

There were two James Shaws living at Smith's Falls, father and son. The father was no doubt the person intended to be sued, for the stock was subscribed by him, and the notes made by him, as was proved on the trial; and the summons was properly addressed to him, and not to James Shaw the younger. The declaration and record were consistent with the summons in this respect.

The endorsement on the summons stated the causes of action to be for a call of five per cent. on 100 shares of

stock held by the defendant and upon the three notes, describing them as they were afterwards set out in the declaration.

Before the action was brought, James Shaw, the father, was written to by the solicitor of the Provincial Insurance Company for payment, and he wrote an answer to the president of the company, stating the sum which had been demanded of him by the solicitor, and that it was not convenient for him at present to pay it, but promising to give early attention to the matter.

The deputy sheriff returned that he had served the summons upon James Shaw, the defendant; and an appearance by attorney having been entered and pleas pleaded, the case was carried to trial.

Upon the trial, at Toronto, before *Hagarty, J.*, it appeared that the deputy sheriff had given the summons to James Shaw the son, saying, "Here is a paper for you," and saying nothing to him about his father when he handed the summons to him. The father and son lived in different houses in the same village. In whose house the son was when he received the paper was not stated. The son was examined at the trial, and stated that he knew when he received the summons the officer had made a mistake, for that he had never had any transaction with the Insurance Company; that his father was from home at the time, but returned two days afterwards, when he, the witness, gave him the summons, telling him that the sheriff had made a blunder, and served the wrong person. He stated further that he sent the summons by his father to an attorney in Perth, whom he usually employed, telling him if it required any defence to defend it: that he gave the attorney no other instructions, and did not know what other instructions he got, nor how the suit was defended, till he received a subpoena to attend as a witness. He sent no money to the attorney with the writ, as he said, and knew nothing further, nor on what instructions nor by whom the suit was defended. He left that all to the attorney. His father, he said, once told him to see about this process as he was going to Perth.

The question upon this evidence was whether James Shaw the younger, on whom the writ was served, or to whom at least it was given without any instructions to deliver it to his father, must be considered as the defendant, without regard to any subsequent act or conduct of the father, so that, no demand against the son being proved, the plaintiffs should be nonsuited.

A verdict was rendered for the plaintiffs for \$834.14, leave being reserved to move to enter a nonsuit or a verdict for defendant.

Beaty obtained a rule *nisi* accordingly, on the ground that the evidence shewed that the defendant who was served with the writ of summons, and who defended the action, was not the maker of the promissory notes declared on, and was not indebted to the plaintiffs as alleged in the declaration. He cited *Tay. Ev. sec. 1657*.

Duggan, Q. C., shewed cause, and cited *Phillipps v. Ensell*, 2 Dowl. 685; *Rhodes v. Innes*, 7 Bing. 329; *Jones v. Jones*, 9 M. & W. 75; *Killens v. Street*, R. & H. Dig. 232.

ROBINSON, C. J., delivered the judgment of the court.

The statute, Consol. Stats. U. C., ch. 22, sec. 16, directs that the service of a summons whenever practicable shall be personal, and by section 19 it is provided that no costs shall be allowed for the service unless when the writ has been served by the sheriff, his deputy, or bailiff, except under certain circumstances provided for in the 18th clause. But though no costs are to be levied for the service in general, unless where it has been made by the sheriff or his officer, yet the service by another person is not illegal or irregular, as it was while the statute 2 Geo. IV., ch. 1, sec. 4, was in force. Then here it appears the copy of summons was delivered to the father *personally* by his son. The father received the summons, which was properly directed to himself, and was intended for him; and it is quite clear from the evidence, and from the contents of the summons, that he must have known, and did know that he was the person to whom the summons was directed, and for whom it was

intended. His receiving it from his son, who had the same name, was no more irregular than if he had received it from any other person not having the same name, and can make no difference, unless we could see that he was misled by the accident of its being given to the son who has the same name, and supposed in consequence that the action was against his son, and not against himself, and so did not appear to it. But here the facts were altogether different. He received the summons from his own son's hand, with the intimation from his son, which could not have been necessary, that it had been given to him by mistake; and the father, the real defendant in the writ, took it himself to an attorney, and gave to that attorney whatever instructions were given. In consequence of this an appearance was entered in proper conformity with the summons—that is, in the name of James Shaw, which properly belonged to the father, and not in the name of James Shaw the younger; and the plea being in the same name, the case went down to trial, just as it would have done if the father, to whom the writ was directed, had received it from the hands of the sheriff.

We think the case cited of *Rhodes v. Innes* (7 Bing. 329) is very much in point, and also *Williams v. Piggott* (1 M. & W. 574.)

In *Phillipps v. Ensell*, (2 Dowl. 685,) Baron *Gurney*, speaking of *Rhodes v. Innes*, says, “there really was *actual* service,” but that was said only upon the ground that the father had been trying to evade service, and that the court inferred from the facts proved that he must have heard of the service of the writ upon the son, and that the process must have come to his knowledge. In the case before us it was clearly proved that the father did get the writ in time to defend himself, and that a defence was entered in his name, and by his instrumentality, after he had received the writ.

There is no such question about identity as was raised in *Jones v. Jones*, (9 M. & W. 75,) upon the evidence given in the cause.

I have a note of the case of *Killens v. Street* in this

court, not reported, but mentioned on the argument of this case. There the facts were so far different, that it did not appear the father ever saw the writ, or that he knew any thing of it, till after his son, on whom it was served by mistake, had appeared and pleaded to it, by an attorney whom he had himself instructed. (a)

In our opinion, the defendant's rule *nisi* for entering a verdict in his favour, or a nonsuit, should be discharged.

Rule discharged.

THE QUEEN V. CALLAGHAN.

Indictment for perjury—Form of.

Where it appears on the face of an indictment for perjury, that the statement complained of was made before a justice of the peace in preferring a charge of larceny committed within his jurisdiction, it is unnecessary to allege expressly that he had authority to administer the oath.

DEFENDANT was tried at Woodstock, before *McLean, J.*,

(a) The reporter has been unable to find the judgment delivered in that case, which was decided in Michaelmas Term, 4 Vic., and has not been published, but he has procured a statement of the facts, which were as follow :

The plaintiff, intending to proceed against John Street the elder, sued out process against John Street, which by mistake was served on John Street, junior, his son. The son employed an attorney, who appeared for him, and pleaded the general issue. The father gave no instructions in the suit.

The plaintiff attempted at *nisi prius* to obtain a verdict against the father, although process had been served on the son, and all subsequent proceedings conducted by and against the attorney of the son.

It was proved at the trial that the father knew of the service on the son, some time after it took place, whether before plea or not was not shewn. The son also suspected that the service was intended for the father. No express evidence of collusion between the two to deceive the plaintiff was given, though there was much evidence to satisfy the jury that the father knew of the service in time to make a defence, if he had chosen, but it was not shewn that he took any step in the cause, as if he acknowledged the service; though he wrote a letter to the plaintiff, or rather directed one to be written, in consequence of the action having been brought, though not referring to it as a suit against himself.

The jury were directed to find for the defendant. It was objected that it might have been left to the jury to find a fraudulent collusion respecting the service and defence, upon which the jury might have treated the case as one against Street the elder, and on that ground a new trial was moved for.

It would appear that the rule was discharged, for the note of the case in R. & Har. Dig., p. 232, referred to on the argument, is as follows: "Where in an action against a father, process was served upon his son of the same name, and appearance was entered and defence made by the son, the court held that a verdict for the defendant was correct, and that whether there was collusion or not the plaintiff could not recover against the son so as to charge the father."

and convicted of perjury on a deposition made before a magistrate, charging one Redmond Sage with stealing sheep from him. The false statement charged was that "he, Callaghan, had bought the sheep from one George Simons, a butcher, then living at Otterville."

Beard moved in arrest of judgment, or for a new trial on the evidence, and for misdirection. The objection taken in arrest of judgment was, that it was not stated in the indictment that Ebenezer Bodwell, who swore the defendant to the truth of his statement, had authority to administer the oath.

ROBINSON, C. J., delivered the judgment of the court.

We see no ground for a new trial. The evidence supported the charge, if the jury gave credit to the witnesses for the prosecution.

As to the motion in arrest of judgment, it is not expressly alleged in the indictment, but it is apparent on the face of the indictment, that the justice must have had authority to administer the oath, for it stated that he was a justice of the peace for the county of Oxford, and that the larceny was sworn to have been committed in that county. The forms in this respect, of indictments for perjury, in England, since the late statute for the amendment of the criminal law, do not contain an averment that the justice receiving the complaint of an offence committed within his jurisdiction, and acting in the matter within his jurisdiction, had authority to administer an oath. Our Criminal Law Amendment Acts, 4 & 5 Vic., ch. 24, and 18 Vic., ch. 92, make this no longer necessary. It certainly is a matter upon which there would be no necessity to offer any evidence upon the trial; and no objection was in this case taken to the form of the indictment till after the verdict.

Rule refused.

KERR ET AL V. CAMERON.

Guarantee—Extension of time—Subsequent promise by surety—Pleading.

Defendant agreed in writing to be answerable for such goods as the plaintiffs should furnish to one C., to the extent of £500. It appeared that by the usual course of dealing between the plaintiffs and C., the goods were sold to C. from time to time, at six months' credit, taking his notes; but the plaintiffs afterwards took three large notes amounting to nearly \$9,000, instead of several smaller ones overdue, and thus extended the original credit. This was done without defendant's knowledge or assent, but it was proved that afterwards, on being asked by one of the plaintiffs for security, he offered to convey a lot of land for £300, and said he would pay the rest as soon as he could. It was not shewn, however, that defendant was then aware of the credit having been extended, and the land was declined.

Held, that the offer having been made on a condition which was not accepted, and without knowledge of the facts, was not binding, and that defendant was discharged.

Semble, the plaintiffs having taken issue on the plea alleging discharge by the extension of time, that the subsequent promise to pay was not admissible in evidence.

The defendant was father of one George Cameron, to whom the plaintiffs, Kerr and Company, sold goods, upon a written guarantee given by the defendant, that he would be answerable for such goods as they should furnish to George Cameron to the extent of £500.

It was proved at the trial at Toronto, before *Draper*, C. J., that the goods were all sold from time to time upon a six months' credit, and notes taken for payment at the respective times: that when these notes fell due the plaintiffs renewed them for the full amount or in part, sometimes several small notes being renewed by one note, all which was done without the assent or knowledge of the defendant, but was according to the ordinary course of dealing between the plaintiffs and their customers. The last goods were sold to George Cameron in November, 1858.

In February, 1859, accounts were settled between the plaintiffs and George Cameron, when he was found indebted in \$12,111⁹⁸/₁₀₀.

The plaintiffs had taken three promissory notes from George Cameron, for \$2,900, each to fall due respectively on the 11th of January, 11th of February, and 11th of March, 1858, to cover notes which had been given by him for goods bought, and which notes had all matured.

By taking these large notes the original credit of six

months, upon which the goods were sold, had been in all cases extended, without any reference to the defendant.

The defendant pleaded a special plea, setting up as a defence that he was discharged by the extension of time to the principal, and issue was taken upon that plea.

The plaintiffs called one Morrison as a witness, who swore that in April, 1859, he went with one of the plaintiffs to the defendant, when the plaintiff spoke to the defendant about his guarantee, and desired to have security. The defendant declined to give a mortgage on his farm, but offered to convey 100 acres of land that he owned, for £300, and said he would pay the residue as soon as he could, remarking that it was kind of the plaintiffs to wait so long. Nothing was said about notes or renewals. The plaintiffs declined accepting the land.

The learned Chief Justice non-suited the plaintiffs, being referred to the case in this court of *Ross et al v. Burton*, 4 U. C. R. 357: remarking, however, that his own impression had been that upon a continuing guarantee, such as this was, the surety would be liable while the debt continued.

M. C. Cameron obtained a rule *nisi* to set aside the non-suit, citing *Stevens v. Lynch*, 13 East 38. He relied upon the effect of the defendant's verbal promise or offer to pay, made in April, 1859, and contended that the evidence should have been allowed to go to the jury.

Cameron, Q. C., shewed cause, and contended that by taking the notes, and thus extending the credit, the defendant was discharged: that the promise to pay spoken of was denied at the trial, and if made at all was made without a knowledge of the circumstances, and was moreover accompanied with a condition of the land being taken for £300, which was declined: that it was not relied upon at the trial; and that the plaintiff's counsel accepted a nonsuit rather than go to a jury.

ROBINSON, C. J., delivered the judgment of the court.

We think the plaintiff was rightly nonsuited. The case of *Stevens v. Lynch*, (12 East 38,) cited for the plaintiffs on the

argument, is not an authority that supports the rule, for, in the first place, when that case was decided every thing was open to a defendant in an action of assumpsit upon the general issue, and of course the plaintiff was allowed to repel the defence when so brought forward by proof any special circumstance that would repel it, though the fact on which he relied did not form the subject of any issue specially raised upon the record. Here the defendant pleaded that time had been given to the principal, whereby he was discharged. The plaintiffs not denying the sufficiency of the defence, in point of law, traversed the truth of it, and the defendant proved it to be true, which entitled him to succeed upon the issue, unless it can be held that the subsequent promise to pay, on which the plaintiff relied, could be received in evidence without having been specially replied, upon the principle that it operated by way of estoppel *in pais*, and disabled the plaintiff from giving evidence of such a defence, by supporting the presumption that the giving time was with his knowledge and consent, which would in effect disprove the plea. But in this case the promise given in evidence was not absolute, but conditional—that if the plaintiff would take the land for £300, the defendant would pay the residue as soon as possible. When that was declined, we think it cannot be said that the defendant was bound to pay by any promise made on that occasion, and besides it was not shewn that the defendant had any knowledge that the plaintiff had given time to the principal by taking notes extending the credit.

Rule discharged.

BRANDON V. CAWTHORNE.

Ejectment—Notice of title—Admission.

Where defendant in his notice of title claimed as purchaser through one M., and the plaintiff in proving his title put in a lease from M. to himself, *Held*, that it was unnecessary for defendant to shew M.'s title.

EJECTMENT for land in Port Hope.

The defendant, in his notice of title, stated that, besides

denying the plaintiff's title, he intended to set up a title in himself as purchaser, derived through William S. Marsh.

At the trial, at Cobourg, before *Robinson, C. J.*, the plaintiff in proving title put in and proved a lease from Marsh to him on the 4th of November, 1859.

The learned Chief Justice held that, the defendant in his notice claiming through Marsh, it was unnecessary for the plaintiff to give evidence of Marsh's title, for that the defendant's notice was *prima facie* evidence of seisin in Marsh, as much as an admission made by counsel in court.

The defendant contended against this, but consented to a verdict being taken for the plaintiff, with leave reserved to move for a nonsuit if it was indispensable for the plaintiff to give evidence of Marsh's title.

Armour moved for a rule *nisi* to enter a nonsuit pursuant to leave reserved, or for a new trial on affidavits.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the ruling at the trial was right, and we therefore grant no rule for a nonsuit, but a rule *nisi* may issue for a new trial upon the affidavits filed. (a)

CROMBIE V. DAVIDSON, SHERIFF.

Sheriff—Payment into Court—Estoppel.

Where a plaintiff obtained an order to take out of court money paid in by the sheriff, on condition that he should pay the master's charges, and was given to understand that he might either take it on those terms, or sue the sheriff for it.

Held, that having availed himself of this order he could not afterwards recover from the sheriff the fees paid to the master, on the ground that the money had been improperly paid into court.

In this case the plaintiff sued the sheriff to recover back from him moneys which the plaintiff paid to the master of the court as his fees and per centage for receiving into court from the sheriff, and paying out of court to the plaintiff, moneys which the sheriff had levied for the plaintiff under executions

(a) This rule was afterwards made absolute.

At the trial, at Berlin, before *McLean, J.*, the jury gave a verdict for the defendant, and *M. C. Cameron*, upon leave reserved at the trial, moved to enter a verdict for the plaintiff, for the sums paid by him to the master in order to get the money out of court, insisting that the sheriff paid the money into court wrongfully, and that he should be made to indemnify the plaintiff for the expenses he had been put to in order to obtain it.

ROBINSON, C. J., delivered the judgment of the court.

Upon the evidence we think the verdict was properly and necessarily rendered for the defendant, for whatever may have been the grounds or pretence on which the sheriff paid the money collected into court, instead of paying it to the plaintiff on whose execution he had levied it, the plaintiff obtained the order of court on which he obtained the money on the condition that he was to pay the master's charges, and he was given to understand that he might either take the order on those terms, or sue the sheriff for the money. With a knowledge of the circumstances, he availed himself of the order, paid the master his fee, and drew out his money, and he cannot under such circumstances recover it back.

Rule refused.

THOMAS AND BEATTY V. ROSS.

Land sold—Common Count for—Contract for sale—Statute of Frauds.

In an action on the common count for land sold, it appeared that the land in question was put up at auction under hand bills signed by the plaintiffs, and having been knocked down to defendant his name was entered as purchaser in a book by the auctioneer's clerk, and he paid the deposit required down, but afterwards refused to pay the subsequent instalments. A bond to convey had been executed by the plaintiffs, and left ready for defendant, with a bond for payment of the money, which he did not execute.

Held, that the plaintiffs could not recover, for the land was not conveyed, and therefore an action on the common count would not lie.

Held, also, that there was no contract for sale sufficient to satisfy the statute of frauds.

The declaration was for money payable by the defendant to the plaintiffs, for land sold by the plaintiffs to the defendant, and for interest.

Pleas 1.—That the plaintiffs did not sell the lands to defendant as alleged; and other pleas, which it is not material to give.

At the trial, at Sandwich, before *Richards, J.*, it was proved that a sale of lots situated in the town of Chatham was advertised by handbills, dated 25th of May, 1854, by the plaintiffs, to take place at public auction in the town of Chatham, on the 1st of July, 1854. The printed terms contained in the handbill, signed by the plaintiffs, were these: "Terms of payment most liberal, namely, one fourth cash, and the balance in four equal annual instalments, with interest at six per cent."

The clerk of the auctioneer proved that the sale took place on the 1st of July, 1854, and that the printed handbill and the terms were read by the auctioneer before the sale commenced, and maps and the handbills were distributed among the audience. The auctioneer's clerk kept a book to enter down the names of the purchasers as the sale proceeded, and he said the name of the purchaser was entered by him and the gross amount at the time of the sale, thus: "Lot No. 58, William McKenzie Ross, \$145—£36 5s. Lot No. 36, William McKenzie Ross, \$125—£31 5s. Lot No. 57, Wm. McKenzie Ross, \$140—£35. Lot No. 59, Wm. McKenzie Ross, \$185—£46 5s.," the defendant being the bidder for those lots at those prices. Columns in the book showing the 1st, 2nd, 3rd and 4th payments, besides the amount for deposit, were added after the sale. The clerk proved further that upon the 2nd or 3rd of July the defendant paid the deposit on his four lots, in all £37 3s. 9d.—that is, he did not see it paid, but one of the plaintiffs told him it had been paid, and he heard the defendant swear to the fact of its being so paid, in his evidence given in the Court of Chancery upon some proceedings between the parties in that court.

The clerk proved that the following memorandum, entered in the sales book, and signed by the auctioneer, was not inserted until some time after the sale: "Sale of parts of park lots 1 and 2 at Chatham Arms, 1st July, 1854, J. Stegg, Auctioneer." The book did not contain the terms of the sale. Park lots 1 and 2 was the property laid out for

sale, as stated in the printed handbills, and comprised the four lots bid off by the defendant.

The auctioneer's clerk also proved that bonds were prepared, first, that the plaintiffs would convey the lots to defendant according to the terms contained in the handbill, and this was executed by the plaintiffs on the 2nd or 3rd of July, 1854, and left ready for the defendant; and, secondly, a bond from defendant to the plaintiffs to make the payments, which bond never was executed. When the second payment became due the defendant was called on for it, and he declined paying the amount, and gave as his reason that he had heard rumours that the plaintiffs had not a good title to the lands, and he refused to complete the purchase.

The defendant's counsel, at the trial, moved for a nonsuit, on the ground that the evidence did not establish a sufficient contract in writing to satisfy the Statute of Frauds.

The learned judge reserved leave to the defendant to move to enter a nonsuit, and the plaintiffs had a verdict for £150 10s. 5d., the unpaid purchase money and interest.

Read, Q. C., obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved. He cited *Kenworthy v. Schofield*, 2 B. & C. 945; *Blagden v. Bradbear*, 12 Ves. 466; *Hallen v. Runder*, 1 Cr. M. & R. 271; *Mews v. Carr*, 26 L. J., Ex. 39.

Prince, contra, cited Sug. V. & P. 119, 120, and *Mews v. Carr* as reported in 1 H. & N. 484.

ROBINSON, C. J., delivered the judgment of the court.

In our opinion the rule for entering a nonsuit must be made absolute. The plaintiffs have declared only on a common count for lands sold by them to the defendant, and they proved no lands sold, but only endeavoured to prove a contract to sell, and a breach of it. If they had proved an existing contract of sale and a breach of it, they must still have failed, because they had not declared on such a contract, and their evidence would have been irrelevant and inadmissible.

In *Hallen v. Runder* (1 Cr. M. & R. 271,) *Parke*, Baron,

said, "In a count for land bargained and sold, you must shew an actual conveyance of land to the defendant, and the mere act of giving possession would not be sufficient to maintain the *indebitatus* count. In point of practice such a count seldom occurs, and it generally could not be sustained, because the deed of conveyance, which must be shewn to pass the interest in the land, generally contains a release of the purchase money."

The defendant in this case pleaded that the plaintiffs did not sell the land to him as alleged, and as the plaintiffs did not by their evidence support the affirmative of the issue on that plea, it is not to the purpose to consider whether they could have supported an action in any other form.

But we cannot say we have any doubt that the evidence given upon the trial did not shew a contract in writing sufficient under the Statute of Frauds. The cases cited, of *Kenworthy v. Schofield*, (2 B. & C. 945,) and *Mews v. Carr*, (1 H. & N. 484, 26 L. J. Ex. 39,) to which latter case Mr. Prince had the candour to refer, though it makes strongly against him, leaves no room for doubt. I think that the evidence was insufficient in a court of law, whatever a court of equity may be able to do upon the ground of part performance taking the case out of the statute.

In our opinion, the rule for a nonsuit must be made absolute.

Rule absolute.

IN THE MATTER OF HENRY H. HUME, APPLYING TO BE
ADMITTED AS AN ATTORNEY AND SOLICITOR.

Articled clerk—Service.

H., having been articled on the 21st of November, 1854, for five years, was permitted by his master to be absent during 1855, for six months, under the belief that that period would be allowed. This he spent at a grammar school preparing for the University. He was afterwards absent from the office for eight and five weeks respectively, in 1856, to prepare for his examination at the University.

Held, that the six months so spent could not be allowed, but that the other periods might be.

The petitioner, Henry H. Hume, applied to the Law

Society of Upper Canada to be admitted as an attorney and solicitor, under the following statement of facts, signed by the attorney to whom he had been articulated.

The petitioner became bound to me to serve for five years, under articles of agreement bearing date the twenty-first day of November, 1854, which are all regular, and were duly filed. He immediately entered upon his service under these articles. In 1855 I permitted him to be absent for six months, believing that such period would be allowed in his time. He spent this period as a boarder in the grammar school at Barrie, preparing for the University. In the spring of 1856 I permitted him to absent himself from my office for five weeks, and in the spring of 1857 for nearly eight weeks, in order, on both occasions, to prepare for his examinations at the University. On both of the latter occasions, however, he being an inmate of my house, I was in the constant habit of giving him business to do in the evenings when I was pressed, and also of desiring him to attend at the office when he was particularly required. He continued, with these exceptions, in regular daily attendance under his articles until the twenty-first of February last, since when he has only occasionally attended to superintend suits of which he had the care.

(Signed,) SKEFFINGTON CONNOR.

Mr. Hume having passed the necessary examination, the law society reported specially to this court the above facts, in order that the court might declare whether the service was sufficient to authorise the society to grant him a certificate for admission as an attorney-at-law.

ROBINSON, C. J., delivered the judgment of the court.

As the law now stands (Consol. Stats. U. C., ch. 35) any question arising upon the sufficiency of the service of an attorney's clerk under his articles, may have to be pronounced upon first by the Law Society, and afterwards by the superior courts of law and equity, severally; and unless all concur in their opinion of the sufficiency of the service, the clerk cannot have the full benefit of his articles. A conflict of opinions on the point in any particular case would be inconvenient and embarrassing, and it is therefore very desirable to avoid it.

No question of the kind can come in ordinary course

before this court, unless the law society has in the first place certified that the clerk whose application is in question has duly served under his articles. If we can suppose a case to arise (which is most improbable) in which the Law Society should improperly decline to give this certificate, though the service under the articles had been such as to enable the clerk to it strictly, and without giving to the statute any latitude of construction, he would perhaps endeavour to obtain a remedy by application to one of the superior courts of law.

If, on the other hand, the Law Society should grant their certificate of due service in a case in which either of the superior courts of law or equity, on being afterwards applied to, should find the service under the articles not to have been such as in their opinion would warrant them in admitting the party, having a due regard to the provisions of the statute, then that conflict of opinions would occur, which would be extremely perplexing, and which it is most desirable if possible to avoid.

For some years this matter of the service of clerks to attorneys, under their articles, was regulated by the ordinance of the Province of Quebec, 25 Geo. III, ch. 4, which ordained that no persons should be permitted to practise in the courts of civil jurisdiction, who had not "served a *regular and continued clerkship, for and during the space of five years*, under a contract in writing with some attorney duly admitted, and practising," &c. After this ordinance, so far as it related to attorneys, had been repealed by our statute 37 Geo. III., ch. 13, it is not clear on the statute book upon what footing this matter stood—we mean as to the sufficiency of the service under articles, and the proof and allowance of the service—until the statute 2 Geo. IV., ch. 5, (1822,) was passed, which enacted that no person should be admitted by the Court of King's Bench to practise as an attorney, "*unless upon an actual service under articles for five years*, with some practising attorney in this Province."

After that statute several acts were passed, which gave to graduates in arts of certain Universities the privilege of

being admitted upon service for three years with some practising attorney, and the expression adopted in these acts was "provided such persons *shall have faithfully served, &c.*"

In 1857 the statute 20 Vic., ch. 63, was passed, which repealed all former enactments upon this subject, and enacted that no person should be admitted an attorney or solicitor, unless he should have been bound by a contract in writing to serve as a clerk for five years to a practising attorney or solicitor in Upper Canada "and shall have *duly served* under such contract *for and during the said term of five years,*" and by the 9th and 11th sections of this act, it was plainly required that any person bound by contract in writing to serve as clerk to any attorney or solicitor, should "*during the whole time and term of such service, to be specified in such contract, (not exceeding the term of five years,) continue and be actually employed by such attorney or solicitor in the proper business, practice or employment of an attorney or solicitor.*"—Sec. 9.

This is the footing on which the matter rests at present, in regard to all proof of the service by clerks applying to be admitted under articles executed before as well as after the passing of that act, and of the ch. 35 in the Consolidated Statutes of Upper Canada, in which these enactments are preserved. And the provision which we have just above repeated, as defining the service which must take place, is taken verbatim from the English statute 22 Geo. II., ch. 46, sec. 8, and from the imperial act 6 & 7 Vic., ch. 73, the existing law in England, which retains in this respect the exact language of 22 Geo. II., ch. 46. This is so far satisfactory, that whatever we find to have been determined in England in regard to a service complying or not complying with the requirement of the law there, bears directly upon the question of sufficiency of the service under our now existing law.

And in this case of Mr. Hume, or any other that may arise, where there has been something out of the common course, it will be proper to consider—1st, whether according to the course which has been taken in England in acting upon a statute perfectly similar to ours, the law can be held to have been sufficiently, that is substan-

tially and in good faith, complied with; and if not, then, 2ndly, whether our own courts have, since the passing of the 20 Vic., ch. 63, *or before*, accepted and allowed such a service as sufficient. We say "or before," because, although 20 Vic., ch. 63, and our now existing statute, do in strictness apply to all cases of application for admission, though upon service which may wholly or in part have taken place before the 20 Vic., ch. 63, was passed, yet if there be a case in which service that had taken place before the 20 Vic. would undoubtedly have been held sufficient according to the course of our courts under the previous statutes, which required nothing more specific than that the clerk should have *duly* or *faithfully* served according to his contract, we should naturally lean against applying a more rigid construction in regard to a service that had passed, by subjecting it to a new rule. We might, however, find it impossible to avoid this, consistently with the statute now in force; and the case would not necessarily be one of great hardship, unless in any instance where the requiring the service to be made up, would, as it sometimes might, press with particular inconvenience, either from pecuniary or other considerations.

Now in regard to the application of Mr. Hume, the fact is that whatever is exceptional in his case did take place before the 20 Vic., ch. 63, was passed, which circumstance it may be material to bear in mind, though after all, whether there is or not any material difference in what the present law requires (following, as it does, the provision that was contained in the 20 Vic.) from what was really necessary under the former law—*ex. gr.* 2 Geo. IV., ch. 5—turns upon matter of opinion, in regard, namely, to what should be considered as a *due* and faithful performance of a contract by a clerk to serve an attorney for five years. If there should really be thought by us to be no substantial difference, then what has been said by our courts in allowing service as sufficient before the statute 20 Vic., was passed, might be suffered still to guide us in actions under the now existing law.

Then first, for we proposed to consider this first, should we be warranted by the course which we find to have been taken in England, under statutes precisely like our own now

existing statute, in allowing Mr. Hume the benefit of the six months spent by him in 1855 and 1856, wholly away from his master's office, but in a manner to which his master assented.

The cases upon the subject are not very numerous, and in some of them the courts have seemed to allow themselves much greater latitude in acting under the statute than in others. The following are cases in which the court have departed furthest from a strict compliance with the words of the statute, in favour of the applicant for admission. Fletcher's case, (2 W. Bl. 734,) Carter's case, (ib. 957,) in which cases, however, there seems to have been a service of five years under articles, though at long intervals. Hubbard's case, (1 Dowl. 438,) Frost's case, (1 Har. & Wol. 111,) Hodge's case, (2 Jur. 989,) Cross's case, (2 Dowl. N. S. 692,) Llewellyn's case, (ib. 701.) None of these cases, however, apply closely to the circumstances of the present case.

The instances in which the courts have shewn least disposition to relax, are where the clerk has during the period covered by his articles made some other engagement, which has subjected him to the control of another master, or has assumed duties of another kind, which have interfered, or which might have interfered, with the due discharge of his duties under his articles; as in Taylor's case, (4 B. & C. 341,) and the case of *The Queen on the prosecution of Page v. The Society of Scriveners*, (3 Q. B. 939,) which latter was the case of a clerk to a notary, not to an attorney, but is to the purpose, because the Scriveners' Company, to whom the application was made to admit, were controlled by a statute precisely like that which governs the admission of attorneys, at least in the point which we are now considering. The court of Queen's Bench, on an application for a mandamus to admit, held that the clerk ought to have been admitted, but the case having been carried to the Exchequer Chamber their judgment was overruled. The case was a remarkable one, for the clerk had first articulated himself to his father in the business of a notary, and had duly served the greater part of the five years, when, his father being also

an attorney, the clerk entered into articles to serve him as an attorney also, and continued so serve in both capacities. It was determined in error that he could not be held to be duly serving as a notary's clerk while he was at the same time under articles as an attorney's clerk, though to the same master.

On examining the English cases, we think they do not any of them support the sufficiency of Mr. Hume's service, so far as the six months spent at Barrie in 1856 is necessary to be reckoned as part of the time.

As regards those two shorter absences, in 1856 & 7, under the circumstances stated, we agree that if the Law Society shall think proper to allow the time to count we should have no difficulty in taking the same view of the case, upon what we find to have been done in the English courts in acting upon a statute which we have explained is precisely similar.

But we ought also, we think, to take into consideration the course which has been taken by this court in regard to the admission of attorneys from a period long before our time, and, so far as we are aware, consistently pursued throughout.

Under our statutes in force before that of 20 Vic. ch. 63, and which required proof of *due* and *faithful* service under the articles, it has always been held that occasional absences, either from long illness, or other urgent cause, with the assent of the master, might be reckoned as part of the five years, of course governed by the discretion of the court. And it has never been considered that occasional absences for short periods with the master's consent, even without the excuse of illness or other urgent reason, must of necessity be disallowed, as inconsistent with the due service exacted by the statute.

Every case of that kind must depend on its own circumstances, and within the whole period to which my recollection extends, this court has allowed it to be understood that as a general rule such periods of absence, with the master's consent, would be allowed to be reckoned in as part of the time served under the articles, provided they did not in all exceed six months. I am satisfied that a very large propor-

tion of the gentlemen hitherto admitted have availed themselves of this understood permission, and we have in numerous cases seen it stated in the affidavits filed, that the clerk has faithfully served during the five years, with the exception of occasional absence with the master's consent, not exceeding in the whole six months. It can hardly be insisted upon as reasonable, that during the whole five years the clerk must give a daily attendance in the office during the hours of business, and shall not avail himself of any indulgence which the attorney may be willing to allow him, for recreation or for other reasons besides illness, of which there may be many, and some of them scarcely less urgent.

That is not expected to be the footing of a clerk or apprentice in any profession or trade, and we do not consider that in this respect the late statute has made a material alteration, since that is necessarily to be construed with reference to what is properly to be understood by the term "service."

If, however, the Law Society shall desire to give a more strict construction than has been hitherto given to the word *service*, either from a regard to the best interests of the profession, or because they consider that the more explicit language of the recent statute seems to require it, it is in their discretion, as we apprehend, to do so.

We will only add that, as regards this particular case, whether we should adhere to the course of the courts in England, so far as a rule can be gathered from the several decisions, or should take such a course for ourselves as we might think open to us under the existing law, and considering our former practice in this respect, we should equally feel ourselves bound to hold that the six months should be excluded which were spent by Mr. Hume at the Grammar School in Barrie, in preparing for his degree in the University; first, because, besides that period of absence, there were other three months which were not served under the articles in the regular manner, but required some measure of indulgence to be extended; and, next, because we infer from the statement placed before us, that the object of spending the six months at Barrie, away from the attorney's office, was to

qualify the clerk for taking a degree in arts, which, when taken, would confer upon him a great privilege under the statute, by shortening very materially the period of service; and it would not be reasonable that the term of service should be further encroached upon by the clerk withdrawing from the attorney's office in order to prepare himself by a course of general study for taking the degree. By taking that course in a case like the present the term of service would be reduced from five years to two and a half, and the boon granted by the legislature would be extended further than we can suppose them to have contemplated.

We have conversed with the judges of the other courts, and we all think that Mr. Hume should be required to serve six months more under fresh articles, and we should not object to allowing the other three months under the facts stated.

FRASER V. THE BANK OF TORONTO.

Chattel mortgage—Affidavit—Description of goods—Mortgage given to secure endorser—Effect of renewing the notes—Interest.

An affidavit that a chattel mortgage by two mortgagors was executed in good faith, and not for the purpose of securing the goods and chattels against the creditors of the mortgagors, is sufficient, without adding the words, "or either of them," as regards the mortgagors, or "any or either of them," as regards the creditors.

The goods were described in the mortgage as set forth in schedules annexed. Schedule C. was headed "Household furniture in J. E. W.'s residence," and specified the several articles in detail, giving a list of those contained in each room, from which the sheriff said he had no difficulty in identifying them. *Held*, sufficient.

Schedule D. was headed "Household furniture and property of J. R. McDermott," and the several apartments containing the furniture were specified. *Held*, also sufficient, as it might be assumed to refer to the party's residence.

The mortgage was given, as appeared by the recitals in it, to secure the plaintiffs against certain notes which he had endorsed for the mortgagors, and before the re-filing he had taken up most of them and renewed them by his own notes, to which the mortgagors were not parties. *Held*, that the mortgage was not thereby invalidated.

The affidavit for re-filing, made on the 28th of January, stated the amount due for interest at what it would be on the 31st, the day of re-filing. *Held*, no objection.

This was an interpleader issue, to try whether this plaintiff was, on the 13th of July, 1859, owner of certain goods which were seized by the sheriff of Northumberland and

Durham, on a writ of *fi. fa.* delivered to him on that day against the goods of Lang, McDermott, and Walsh, at the suit of the now defendants.

At the trial, at Cobourg, before *Robinson*, C. J., the plaintiff, Fraser, claimed under a bill of sale, made to him by way of mortgage on the 3rd of February, 1858, by McDermott and Walsh, who were then the owners of the goods.

There was no ground furnished by the evidence for suspecting that the transaction was not perfectly fair and in good faith, but on the defendants' part several legal objections were taken.

The mortgage made by McDermott and Walsh, two of the defendants in the *fi. fa.*, recited that Fraser was endorser upon certain promissory notes then in possession of third parties, and not yet due, but which would become due within a year from the date of the mortgage, which notes were made by McDermott and Walsh, for sums amounting in all to £2732 13s., and were set forth in a schedule annexed to the mortgage: that McDermott and Walsh were desirous to give security to Fraser for the payment of such sum, for which he had become liable as endorser on their account, and had by indenture between them and him agreed to give a mortgage upon the goods and chattels of them, McDermott and Walsh, set forth in certain schedules annexed to the mortgage, marked B. C. D., upon the conditions contained in the said recited agreement: that is to say, that if the said McDermott and Walsh should pay to the parties entitled thereto all sums of money as they should become due on the said notes, or either of them, and should at all times protect and keep harmless the said William Fraser against all costs, payments, charges and expenses which he might sustain by reason of McDermott and Walsh not paying all or any part of the moneys due or becoming due on the said notes, or either of them, then the mortgage should become void. And then the indenture of mortgage witnessed that for the consideration recited, and the further consideration of five shillings, the mortgagor sold and assigned to Fraser all and singular the goods, chattels, and household stuff, particularly

mentioned and set forth in the schedules B., C., and D., annexed to the mortgage, to hold to him subject to the conditions contained in the agreement recited.

Schedule B., annexed to the mortgage, was headed "Sundries in Pine Grove Soap Factory, belonging to McDermott & Walsh."

Schedule C. was headed, "Household furniture in James Exter Walsh's residence."

Schedule D. was headed, "Household furniture and property of J. R. McDermott."

The articles enumerated in these schedules were not severally described in any manner that could enable a person to distinguish them from other articles of the same kind.

The mortgage was filed on the 4th of February, 1858, on affidavit made on that day, and was re-filed on the 31st of January, 1859, on an affidavit made on the 28th of January.

The affidavit of the mortgagee made on the first filing stated that he was liable as endorser of certain promissory notes for the mortgagors, then in the hands of third parties, and not yet due, but which would become due within a year from the day of the date of the mortgage, to the amount of £2732 13s., as set forth in the mortgage: that the mortgage truly set forth the agreement between the parties, and truly stated the extent of the liability intended to be created by such agreement, and covered by such mortgage; and that such mortgage was executed in good faith, and for the express purpose of securing the mortgagee against the payment of the amount of his liability for the mortgagors, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the mortgagors, nor to prevent such creditors from recovering any claims which they might have against such mortgagors.

At the conclusion of the case, upon the trial, the defendants objected that the mortgage was void:

1.—Because of the affidavit of the mortgagee on which it was filed not stating that it was not made for the purpose of securing the goods, &c., mentioned therein against the creditors of the mortgagors, "or any or either of them," or to prevent such creditors, "or either of them," from recovering, &c.

2.—That the description of the household furniture was not so particular as the statute required.

3.—That it appeared from the mortgage that it was given for debts or liabilities upon certain notes mentioned in a schedule annexed, and that if before the re-filing of the mortgage any such notes had been renewed, the mortgage was not as to those notes unsatisfied; and if the original mortgage recited liability to Fraser upon the notes that were afterwards so renewed, then it would not as to those notes give a true account of the debt at the time of the re-filing, and would on that account be void as to the whole.

4.—That the affidavit made of the amount of debt at the time of re-filing was incorrect, the interest being calculated to the 31st of January, and the affidavit made three days before.

The sheriff swore that he seized under the *fi. fa.* all the goods mentioned in the schedules annexed to the mortgage, having been furnished with copies of the schedules: that McDermott and Walsh lived in different houses, and that he had no difficulty in identifying the articles.

It was proved that, McDermott and Walsh had each lived for six or seven years in their respective houses.

With the exception of one note, for £272 13s., which was paid by another party to the note, the plaintiff, Fraser, paid all the notes mentioned in the schedule annexed to the mortgage, and he produced them in court, or rather, as to some of them, which had been renewed, he produced the renewal notes taken up by him, to which renewal notes it appeared McDermott & Walsh were not parties.

The balance due to Fraser at the time of the trial was proved to be £2179 7s. 9d., and there seemed no reason to doubt that it was a perfectly just claim.

A verdict was found for the plaintiff, and leave reserved to move to enter a verdict for defendants, on the objections taken.

J. D. Armour obtained a rule *nisi* accordingly.

Hector Cameron shewed cause, and cited *Rose v. Scott*, 17 U. C. R. 395; 20 Vic., ch. 3.

Cameron, Q. C., supported the rule, and cited *Hutchison v. Roberts*, 7 C. P. 470; *Harris v. Commercial Bank of Canada*, 16 U. C. R. 447; *Howell v. McFarlane*, Ib. 469.

ROBINSON, C. J., delivered the judgment of the court.

As to the first objection, the affidavit clearly follows the statute, in stating, as it does, that the mortgage was not executed for the purpose of securing the goods and chattels mentioned therein against the *creditors* of the mortgagors, nor to prevent such creditors from recovering any claim, &c. The legislature did not think it necessary to add the words "*or either of them*," after the word "*creditors*," though in every case where there were more creditors than one it would be as necessary as in this case. They assumed that on general principles of construction those words would be implied, on the maxim that "*omne majus continet in se minus*." We should not add to the requisitions made in the statute, and hold a deed void which may have been perfectly just and honest, because the affidavit for filing does not contain some statement which the statute does not enact. The cases in this court of *Boulton et al. v. Smith*, (17 U. C. R. 400,) and of *Harding v. Knowlson*, (Ib. 564.,) will serve to shew that we have felt it necessary to be strict in not allowing parties to omit statements in their affidavits which the statute in terms requires to be made, even though the omission may be thought not very important, but we have in no case held statements to be indispensable which the statute does not call for.

Upon the second objection, that the household furniture is not so described in the mortgage and schedules as to comply with the fifth section of the statute in that respect; the articles were all enumerated in two schedules, C. and D. Schedule C. was headed "*household furniture in James Exter Walsh's residence*." The several articles were all specified in detail—as, *ex. gr.*, so many chairs, a piano, a sofa, &c.—not classing them, but specifying what the articles were, and how many of each, and the schedule contained an inventory of the articles in each room. The Deputy Sheriff said he had no difficulty, going with a copy of the schedules,

in identifying the articles, by which we suppose that finding in the several rooms, or somewhere in the house, such articles as he found in his list, he concluded they were the same. We have found this provision in the statute a difficult one to deal with, but construing it reasonably we have taken such a description, and even one less particular, to be sufficient, where it has been stated in it that it was the household furniture of the mortgagor in a certain house. It is true that the locality of the house has been commonly specified, and here it is not; but, on the other hand, the furniture is described as being in the mortgagor's residence, which we think sufficiently answers the purpose. It was proved on the trial that the house in which the furniture was had been his residence for six years and more. We think the goods comprised in schedule C. should be held to have passed by the mortgage.

Those in schedule D. stand on ground not so plainly in favour of the mortgage, for they are not more particularly described in themselves, which indeed it would not be reasonable to expect, and they are not described so as to enable any one readily to distinguish them, unless the statement in the heading that they were household furniture and property of J. R. McDermott, can be properly held to be such a description. We have doubted whether it could be so held, for that description would seem to extend equally to all articles enumerated in the list, "belonging to McDermott," without distinguishing them from any other articles of a like kind, wheresoever situated, in Upper Canada or elsewhere, except by the proof of property in McDermott. To hold this to be sufficient would, as we feared, be unnecessarily leaving creditors and subsequent purchasers in a state of uncertainty in regard to identity, against which it was the object of the statute as far as might be to protect them. It would have been easy to mention at least where the *furniture* was. If McDermott owned several furnished houses in one or more places, would not the mortgage apply to the furniture in one of such houses as well as in another? Of course, as to the general word "*property*," nothing can be claimed under that word, standing, as it

does, unconnected with any language which can limit its meaning. But the *household* furniture, though it is not, as in schedule C., described as being in the residence of the party, may perhaps be so understood from the use of the word *household* without any unwarrantable stretch of construction. We have conferred with the Judges of the Common Pleas, who have this precise question before them, and considering that the schedule specifies the several apartments in which the furniture was, we think we may assume that this schedule refers, like the other, to the party's dwelling house.

The third objection was the one that seemed to be most insisted upon at the trial, but it appeared to me that the objection was taken under an impression that there was some more substantial ground for it than there appeared to be when the facts were explained. I mean as regards the merits of the case. The evidence of Mr. Fraser, who was called by the defendants, seemed to me to be perfectly plain and candid, and I have no doubt that the plaintiff's counsel were satisfied of its correctness, and that nothing unfair was done or intended, either in taking the security or in the use attempted to be made of it. The fact appeared to be clearly made out that McDermott and Walsh were indebted to Fraser, or liable to him as endorser of their notes, to the amount mentioned in the mortgage, and that there were none of the endorsed notes out at the time of the mortgage being given which had any thing like a year to run. As they fell due most of them were renewed by notes given by Fraser, to which McDermott and Walsh were not parties, so that in effect he assumed the debts, and became debtor in their place to their bank. We think there was nothing in that which invalidated the security Fraser had taken, as being contrary to the third section of the Chattel Mortgage Act, for the mortgage was not taken in the first place, nor kept on foot afterwards, as a security against a liability which he had assumed on account of McDermott and Walsh upon a contract which as between him and them extended their liability beyond the year. He had merely for his own convenience obtained further time from the bank.

The last objection can hardly have been seriously relied upon. In making up the statement of the account due by McDermott and Walsh at the time of re-filing, the person who calculated the interest calculated it to the 31st of January, on which day the statement was filed, though the statement itself was dated on the 28th of January. If the statement is read as speaking on the day of its being filed, then it was correct; if on the day it was drawn up, then there was included three days interest too much, which on the sum due would be about one pound. We should never hold the object of re-filing to be defeated and the security lost by a mistake of that kind, if there were a mistake. Clearly no fraud was intended, and the act was complied with, even if the amount due was by any inadvertence stated at a few shillings too much. It was perfectly correct, however, at the time of filing, which was the date to which the statement should refer.

In our opinion the rule should be discharged.

Rule discharged.

PATON V. CURRIE.

Sale of Goods—Incomplete bargain—Subsequent Sale by Vendor.

One C. sold some timber to the plaintiff, and received \$20 on account, but it was to be culled and measured in order to complete the purchase, and the plaintiff did not call to have this done, and to pay the balance of the purchase money; C. therefore sold to defendant, from whom the plaintiff replevied. At the trial it was not objected that the sale to the plaintiff was not complete, but the bargain between them was denied upon the evidence, and that point having been left to the jury they found for the plaintiff.

Held, that the defendant was entitled to succeed, for the property never passed to the plaintiff so as to prevent C. from selling again, but as the objection had not been taken at the trial, a new trial was granted only with costs to abide the event.

REPLEVIN for a quantity of timber.

Pleas.—1. That defendant did not take the goods. 2. That the property was not the plaintiff's.

The trial took place at London before *Richards, J.*, and the facts appeared as follows:—a person of the name of

Chisholm owned a quantity of timber in the township of Ekfrid, and attempted to sell it to the plaintiff. The plaintiff paid him \$20 on account of the price, but in order to complete the sale and purchase, with a view to delivery of it, there was culling and measuring to take place. This attempted sale took place about the 16th of April, 1859. The plaintiff did not proceed to have the timber culled and measured as agreed upon, and never paid any thing more on it. On the 27th of May afterwards Chisholm sold and delivered the timber to the defendant, and the defendant paid him in full for it. The reason given by Chisholm for so doing was that the plaintiff never came, as he had agreed with him he would do, to have the timber culled and measured, and upon that being done to pay the residue of the money. Chisholm said he had sticks of timber enough to give the plaintiff in payment of the \$20, or that he would refund him the money.

The only dispute on the part of the defendant at the trial was whether in truth there was any bargain made between the plaintiff and Chisholm, and the question was not raised whether the attempted bargain had in truth been completed by delivery, or doing all that was necessary in order to pass the complete title in the timber to the plaintiff.

The learned judge therefore did not direct the jury that the plaintiff's title failed, the defendant not having made that objection, but left the point to them as it had been urged by the counsel on both sides, namely, whether there was any binding bargain established between Chisholm and the plaintiff, telling them they must decide that question on the credibility of the witnesses.

The jury found for the plaintiff.

Read, Q. C., obtained a rule *nisi* for a new trial on the law and evidence, there being no written bill of sale to the plaintiff, or bill of sale registered, and the title of the plaintiff being void as against the defendant, because the property in the goods had not vested in the plaintiff, and the title of the defendant was good as against the plaintiff.

J. Wilson, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We think the rule should be made absolute, costs to abide the event, for the timber had not been culled and measured, and until that was done the price to be paid was not settled or known, and the sale was not complete. The vendor had the right to sell it to another, and it appears he did, and the only question as between him and the plaintiff would be whether there had been a binding agreement made between them, upon which Chisholm could be sued for not delivering the timber, and whether under these circumstances Chisholm had not a right to re-sell it on account of the plaintiff not coming, as he had promised, to measure it and pay for it, but delaying so long after the time that Chisholm might reasonably rescind the contract.

In some cases of this kind it has been held that before the vendor re-sells the goods he should give an intimation to the vendee of his intention to do so, unless the vendee comes and pays for the goods; but whether it would be reasonable under the circumstances of this case to apply that principle, if the first vendee was suing the vendor for not delivering the goods, is a distinct question from the question whether by what had taken place between those two the property had passed to the plaintiff, so that a subsequent vendee under the same vendor could not hold the property.

The defendant upon the trial of this case did not, it seems, raise the objection that the first sale was not complete so as to vest the property in the plaintiff, even if the evidence produced by him were credited. He disputed rather the truth of what his witnesses stated. As the right of the plaintiff to sell the property as his, however, lies at the very foundation of his suit, we cannot avoid considering the fact of what was proved in that respect, though, as the defendant did not rest his case upon this ground at the trial, we think the costs should be made to abide the event.

Rule absolute.

WILSON V. WITTROCK.

WITTROCK V. WILSON.

Agreement for sale of land—Construction—Condition precedent—Dependent and independent covenants—Neglect to furnish abstract—Covenant proved in part—Right to recover.

- A. and B. entered into an agreement under seal, by which A. sold to B. certain land for £150, payable £50 in three months and the remainder in two instalments, on the 12th of January, 1858 and 1859, with interest. B. covenanted to pay at the days named, and A. covenanted "on payment of the said sum of money with interest as aforesaid, in manner aforesaid," to convey and assure the land to B., his heirs and assigns, "by a good and sufficient deed in fee simple, as per abstract of title to be furnished by the said A. within a reasonable time before the 12th of January, 1859;" and it was stipulated that time should be of the essence of the agreement, and that unless the payments were punctually made A. should be at liberty to re-sell the land as if the contract had not been made.
- B. paid the first two instalments, and A. never furnished any abstract, but on the 13th of January, 1859, he tendered to B. a conveyance, which B. refused. On the 20th B. tendered the remaining instalment and interest, and demanded an abstract, which was not given.
- A. then sued B. for the instalment unpaid, to which B. pleaded that no abstract was furnished to him, and that on the 12th of January, 1859, he tendered the money if A. would then furnish the abstract and convey, which he refused to do.
- And B. brought a cross action against A. to recover back the money paid, alleging that A. covenanted to furnish him with an abstract of title within a reasonable time before the 12th of January, 1859, and to convey on that day, but did neither. A. denied the covenant.
- Held*, 1. That A. was entitled to succeed in his action, for the furnishing the abstract was not a condition precedent to payment of the last instalment, and B. did not tender the money on the 12th.
2. That he was also entitled to a verdict in the suit brought against him, for his covenant was not to convey on the 12th of January, 1859, absolutely, but upon payment of the money agreed; and although he did covenant to furnish an abstract as alleged (the agreement in that respect being held to amount to a covenant) yet the covenant declared upon was not proved.

These were two actions of covenant, brought by the parties respectively, upon an agreement between them, for the sale and purchase of three acres of land in the vicinity of the village of Morpeth, dated the 12th of January, 1857.

The agreement was in substance as follows: Wilson sold to Wittrock the three acres in question for £150, payable thus, £50 in three months after the date of the agreement, and the remaining £100 in equal payments on the 12th of January, 1858, and 12th of January, 1859, with interest. Wittrock covenanted with Wilson to make the payments at the days mentioned, and to pay taxes, rates, &c., from the date of the agreement.

Then followed the covenant which occasioned these two

suits—one for the purchase money by Wilson, and the other by Wittrock to recover back what he had paid. The covenant was in these words: “In consideration whereof, and on payment of the said sum of money, with interest as aforesaid, in manner aforesaid, the said party of the first part (Wilson) doth for himself, his heirs, executors, administrators and assigns, covenant, promise and agree to and with the said party of the second part, (Wittrock,) his heirs, executors, administrators or assigns, to convey and assure, or cause to be conveyed and assured to the said party of the second part, his heirs or assigns, by a good and sufficient deed in fee simple, *as per abstract of title, to be furnished by the said Wilson within a reasonable time before the 12th day of January, 1859*, with the usual covenants of warranty, the said piece or parcel of land, with the appurtenances, freed and discharged from all incumbrances, but subject to the conditions and reservations expressed in the original grant from the Crown.”

Then followed a covenant that Wittrock should be allowed to occupy and enjoy until default in payment; and the agreement concluded with this stipulation: “And it is expressly understood that time is to be considered the essence of this agreement, and unless the payments are punctually made the said party of the first part is at liberty to re-sell the said land, as if this indenture never had been made.”

Wittrock entered into possession of the land, and paid regularly the first two instalments. Wilson never furnished to Wittrock any abstract of title at all, but upon the 13th of January, 1859, he and his wife, by deed in fee, purported to convey the land to Wittrock, which conveyance was upon the same day tendered to Wittrock, but refused by him, he stating that he demanded the money back which he had paid. On the 20th of January, 1859, Wittrock went with a witness to Wilson and stated that he was ready to pay the instalment due, with interest, and demanded an abstract of title. The reply which Wilson gave was, that he thought Wittrock being a lawyer would get that for himself. Wittrock said it was not his business to procure it, but was the duty of Mr. Wilson.

Wilson, upon the 23rd of February, 1859, commenced an action of covenant for the recovery of the £50, the last payment, and interest.

To this action the defendant, Wittrock, pleaded setting out the agreement, and then alleging that no abstract of title of the said land was furnished by the plaintiff to the defendant within a reasonable time before the said 12th of January, 1859, or at any other time, which was a condition precedent to the payment of the said money in the declaration mentioned, and that on the 12th of January, 1859, he tendered and offered the plaintiff to pay him the said money in the declaration if the plaintiff would then furnish the said abstract, and execute a conveyance of the land, but the plaintiff neglected and refused to furnish the said abstract and execute the conveyance.

Issue was taken upon the plea.

Wittrock, on the 26th of February, 1859, commenced his action upon the agreement, declaring in covenant that Wilson covenanted with him that he would furnish an abstract of title to the land to the plaintiff within a reasonable time before the 12th of January, 1859, and also that he would make a good and sufficient deed on that day. The breach alleged was that defendant did not, nor would, on or before the 12th of January, 1859, convey the land to the plaintiff, by a good and sufficient deed, and did not, nor would, within a reasonable time before the 12th of January, 1859, or at any time before or since, furnish the plaintiff with an abstract of title, according to the form and effect of the said covenant.

To this the defendant pleaded that the articles in the declaration mentioned were not made by him, nor did the defendant covenant with the plaintiff as therein alleged. Issue was taken thereon.

Both cases came on to be tried at Chatham, before *Richards, J.* The case of Wittrock v. Wilson was tried first, and in that, besides the facts already stated, the defendant produced an abstract of his title, and it was shewn that he had a good title to the land, and could have furnished it without any difficulty to Mr. Wittrock, but did not imagine any obligation existed upon him to do so, and as he knew that Wittrock was a solicitor he thought he could satisfy himself upon that point.

The learned judge directed a verdict for the defendant, with

leave to the plaintiff Wittrock to move the court to enter a verdict for him for £121, the money he had paid and interest, if entitled to recover the whole, or to enter a verdict for nominal damages.

In the case of *Wilson v. Wittrock*, the learned judge directed a verdict for the plaintiff for £56 15s., the amount of the last instalment with interest, subject to the opinion of the court upon the facts stated.

In *Wittrock v. Wilson*, *J. Wilson*, Q. C., for the plaintiff, obtained a rule *nisi* pursuant to the leave reserved.

The case of *Wilson v. Wittrock* was set down in the paper, and both were argued together.

J. Wilson, Q. C., for Wittrock, cited Platt on Covenants, 70, 82, 87; *Kemble v. Mills*, 1 M. & Gr. 759; *Worsley v. Wood*, 6 T. R. 710; *Campbell v. Jones*, Ib. 570; *Allen v. Cameron*, 1 Cr. & M. 833; *Amory v. Broderick*, 2 Chitty's Rep. 331; *Mucklestone v. Thomas*, Willes 146.

Prince, contra.

ROBINSON, C. J.—In *Wittrock v. Wilson*, which was first tried, a verdict was entered for the defendant with leave to the plaintiff to move the court to have a verdict entered in his favour for £121, or for nominal damages, as the court might think right upon the evidence.

In that action the plaintiff sues *Wilson* upon an alleged covenant by *Wilson* that he would convey to the plaintiff in fee the said land, freed and discharged from all incumbrances, on or before the 12th day of January, 1859, by a good and sufficient deed, with the usual covenants of warranty, and upon a further alleged *covenant of defendant Wilson that he would furnish an abstract of the title of the defendant to the said land to the plaintiff within a reasonable time before the 12th of January, 1859.*

The defendant to this declaration pleads, denying that he made any such covenants, and he pleads no other plea, so that in determining whether the plaintiff was entitled to recover for any amount in this action or not, the only question is whether the deed he produced contained such covenants, or either of them, as he has set out.

Then as to the first covenant set out, the defendant's covenant in the deed produced is "that on payment of £150, with interest, in the manner specified in the deed, (the last payment of which was to be made on the 12th of January, 1859,) he would convey and assign to the plaintiff, by a good and sufficient deed in fee simple, as per abstract to be furnished by defendant within a reasonable time before the 12th of January, 1859," &c.

The defendant did not absolutely covenant to convey on the 12th of January, 1859, as the plaintiff has declared he did, but that *on payment of* the money according to the *agreement he would convey*; and it appears from the evidence that if the plaintiff had declared on the covenant as it was, the defendant might with truth have denied that the plaintiff did pay the money on the 12th of January according to the agreement, for he first came on the 20th of January, and then would not pay because an abstract had not been furnished to him. The plaintiff, I think, therefore failed in proving the first covenant on which he sued.

Then as to the other alleged covenant, to furnish an abstract, the question is did the defendant, by the agreement as I have set it out, enter into such a covenant.

I think the defendant did in effect covenant by the deed to furnish an abstract within a reasonable time before the 12th of January, 1859, and that the reasonable time would be such time as would enable the vendor to make searches and consult with counsel. Till he got that, unless the covenants of the two parties were independent of each other, the vendee would not be bound to pay or tender his money. The case of *Berry v. Young*, (2 Esp. N. P. C. 640, note,) is an authority on that point. I refer also to Sugden on Vendors, I., 402, 410, as shewing that even when there is no express stipulation in the agreement the vendor must be prepared at the time to shew that he really has such an interest as he has undertaken to convey, or the vendee is not bound to accept the conveyance, and may in consequence recover back his deposit. At least that is the general principle; but upon the terms of this deed it appears to me that the money was to be paid on the several days named, and

upon that payment being made the defendant was then entitled to call for his deed.

In the action against the vendor, however, we have to consider that the whole declaration is met by the plea that the defendant did not make such an agreement as is declared upon; and he did not in fact, for both the alleged covenants are contained in one sentence, and are so connected that it seems to me, if the plaintiff has not so set out the contract as to entitle him to recover upon the one, he is for the same reason disabled from recovering upon the other, since the deed declared upon in the first count cannot be held to be the deed of the defendant so far as it relates to the second breach assigned, and not to be his deed in relation to the first breach. He declares upon one and the same agreement under seal, and the defendant denies that he made such a deed as the plaintiff has declared upon. If, therefore, by reason of any variance in a particular essential with reference to either of the breaches, the plaintiff fails in verifying his deed, his action fails as to the one breach as well as the other, and I think the variance is fatal, as I have already mentioned, in setting forth that the plaintiff bound himself to convey the land on the 12th of January, which he certainly did not, but that *on payment of the money* pursuant to the agreement he would convey, which is a very different thing; and the difference is important when it is considered that the plaintiff neither paid nor tendered the money till *the 20th of January*.

If the plaintiff can, under the circumstances, sustain an action at law upon the agreement, by setting it out truly, he can still do that. If he cannot, he must consider whether he cannot obtain a remedy in equity.

For the reasons I have given, I think the verdict for defendant was proper, as the plaintiff had not set out truly the deed on which he sued, and the plaintiff's rule *nisi* must be discharged.

Then as to the other action, of *Wilson v. Wittrock*, for purchase money. The plaintiff set out truly the covenant

on which he sued, and is therefore entitled to a verdict on the plea of defendant which denies the deed.

And upon the second plea the plaintiff was also, I think, entitled to succeed, for the furnishing an abstract of the title was not a condition precedent to the payment of the money, neither is it true that the defendant on the 12th of January offered to pay the plaintiff the remainder of the purchase money. Assuming, and as I think incorrectly, that the plaintiff was bound to tender an abstract of the title before he could call for his money in full, the defendant allowed the 12th of January to pass by, and did not offer to pay until the 20th of January, so that in that respect the defendant's special plea is disproved, and the agreement is very express in providing that time shall be considered the essence of the contract, and that unless the payments are punctually made, the vendor shall be at liberty to resell as if no such indenture had been made.

Now the payments were required to be thus punctually made upon certain fixed days, without reference, in the first place, to any thing that should be first done on the other part. And then the vendor binds himself that *on payment* of the money in manner aforesaid he will do certain things on his part. It could not be with any reason denied that the covenant to make the first two payments are wholly independent covenants, but about them there can be no question, for they have been paid. Those payments being so clearly independent, however, brings the case within the authority of the leading case on this subject, *Pordage v. Cole*, (1 Saund. 319, 320, notes,)—as shewing that the vendee was content to go on making his payments, and relying on the covenants which he had taken from the vendor.

When we come to consider the question with reference to the last payment, however, there is no doubt some room for argument on the part of the vendee, that the making such payment was to be concurrent only with the condition on the vendor's part that he would convey the land to him by the good title, and that the condition to furnish the abstract was even a condition precedent, because undoubtedly the vendor agreed to do that a reasonable time before the day set for making the last payment should arrive.

There are some cases and many *dicta* in the books which seem to give support to what the defendant is contending for in that respect, but I think the weight of authority is decidedly against it, considering the particular terms of this agreement, which bound the vendee to make his payments on certain days, and which impose no duty on the vendor till payment of the money; or, in the words with which the vendor's covenant begins, "upon payment of the sum of money with interest"—that is, of the whole purchase money—"in the manner aforesaid," that is, on the day set. The cases of Mattock v. Kinglake, (10 A. & E. 50,) Dicker v. Jackson, (6 C. B. 103,) Sibthorpe v. Brunel, (3 Ex. 826,) and Wilks v. Smith, (10 M. & W. 355,) are all inconsistent with the conclusion that upon this contract the covenant to pay the purchase money was not an absolute and independent covenant.

In my opinion the plaintiff was entitled to recover for the last instalment and interest, £56 15s.

BURNS, J.—It is not to be wondered at that this agreement gave rise to disputes between the parties, and it seems to be framed as if it were done for the purpose of leaving a loophole by which, if it were desired at a future time, the purchaser might claim to rescind the bargain and try to recover back what might be paid upon it.

The most convenient way to unravel the difficulty will be to take the case of Wilson v. Wittrock first. This is an action on the covenant for payment of the money at a day specially mentioned. So far the case is plain enough. Mr. Wittrock answers that by saying that it is a condition precedent to the payment of the money that an abstract of the title should have been furnished a reasonable time before the 12th of January, 1859, and because that was not done, and because he tendered and offered the money on the 12th of January, and Wilson neglected and refused to furnish the abstract and execute the conveyance, therefore he is not bound to pay. The evidence did not sustain his plea in some respects, for he did not offer or tender the money until the 20th of January, and Wilson had before that, namely,

on the 13th, tendered him a deed of conveyance of the land, which Wittrock refused to accept. The evidence shews that Wilson was not in default in any respect, except as to his having neglected to furnish the abstract of title within the time mentioned. The question therefore which we are called on to decide, is whether that was a condition precedent to his right to call for the money on or after the day named for payment.

It is quite clear and plain there was no covenant on the part of Wilson to furnish the deed of conveyance specially on the 12th of January, or on any particular day. His covenant is that in consideration of the covenant of the other to pay the money as mentioned, and *on payment* of the said money as stated, he will convey the land. The payment of the money therefore is a condition precedent to his being obliged to give the conveyance. The stipulation that the abstract of title was to be furnished within a reasonable time before the 12th of January, by no means proves that Wilson was to make the conveyance on that day. It might so happen that it would take considerable time to settle the matter about the title, even after the 12th of January, and after an abstract furnished. The case therefore comes within the case of *Pordage v. Cole*, (1 Saund. 319,) and Mr. Sergeant Williams' notes to it. See also *Mattock v. Kinglake*, (10 A. & E. 50.) The execution of the conveyance not being a condition precedent to the right to call for the money, it then must follow that if there be any stipulation between the parties with respect to information to be given to each other so as to investigate the title, it must be matter to be dealt with as for compensation. These considerations establish that in the case of *Wilson v. Wittrock* the plaintiff is entitled to retain his verdict. The *postea* should therefore go to the plaintiff.

Now with respect to the case of *Wittrock v. Wilson*, the same considerations must determine the question whether the plaintiff in that case can recover back the instalments paid upon the land as upon a contract rescinded, for it

would be idle to hold that the non-furnishing of the abstract entitled the plaintiff to recover what he has heretofore paid, and at the same time say it formed no bar to recovering the later instalments. The plaintiff in this case has declared as upon a covenant to convey on the 12th of January, but there is no such covenant in the agreement. It is true the covenant for payment of the money is that it shall be done on the 12th of January, but the covenant to convey is that that act shall be done on payment of the money, without naming a day. One of the breaches stated in the declaration as ground for seeking to recover back the money paid, is that the defendant did not convey as he was bound to do on the 12th of January. That claim fails, for there is no such covenant.

What remains to be considered is whether the plaintiff is entitled to nominal damages, treating the stipulation for furnishing an abstract of title within a reasonable time before the 12th of January as a covenant to the effect that the other will do it. I am rather disposed to think that the stipulation for an abstract to be furnished is such a condition as amounts to a covenant to do it. A person might sustain damages in consequence of it not being furnished, as, for instance, he might sell again himself dependent upon it being furnished. Again, he might sustain an injury by being compelled to pay the money before having a complete title, and if he stipulates for information to be furnished to him in respect of the title, I apprehend he is entitled to have that information before he can be compelled to accept the title. The acceptance or non-acceptance of the title is, however, altogether another question than the payment of the purchase money.

The difficulty in the plaintiff's way of even having nominal damages because the abstract was not furnished, is that he has declared as upon an agreement that defendant was bound to convey the land to him on the 12th of January, 1859, and that within a reasonable time before that time he should furnish an abstract of title. The defendant says in reply that he made no such agreement, and did not covenant as the plaintiff has stated. It is true that the defend-

ant did not make such an ageement as stated, for he did not agree to convey on the 12th of January. The plaintiff has enlarged the agreement, and therefore set forth a breach of covenant where there is no such covenant. We could not order nominal damages upon the record as it stands, for that would be affirming something which does not exist. The plaintiff might have amended at the trial, and claimed damages only in respect of the want of being furnished with an abstract, and then the question would have fairly come up, whether that stipulation did amount to a covenant, but it is evident he considered himself entitled to rescind the contract, and did not seek to recover any damages because he had not been furnished with the abstract. The evidence given at the trial shewed that in truth there was no pretext for any claim on the ground of injury by reason of the want of the abstract, and therefore we do the plaintiff no injury by allowing the verdict for the defendant to stand, beyond making him pay the costs of the action, which according to the facts it seems but reasonable he should do.

McLEAN, J., concurred.

Rule discharged in Wittrock v. Wilson.
Judgment for plaintiff in Wilson v. Wittrock.

MOFFATT ET AL. V. ROBERTSON ET AL.

Action against maker and endorser—Evidence—5 W. IV., ch. 1, sec. 9, 16 Vic., ch. 19.

Where defendants being sued as maker and endorser of a promissory note, pleaded a defence shewing want of consideration, which if proved must equally discharge both.

Held, Burns, J., dissenting, that neither could be called as a witness for the other.

ACTION on a promissory note made by the defendant Robertson, payable to the defendant Beamish, or order, and endorsed to the plaintiffs, dated 31st of December, 1858, for \$609.

Pleas, by the defendants jointly, amounting to defence of want of consideration, on which the plaintiffs took issue.

The defence was that the plaintiffs had agreed to assign

a judgment which they held against a third party, upon receiving a note made by Robertson and endorsed by Beamish: that the note sued on was made and endorsed for that purpose, but that the plaintiffs never assigned the judgment, and yet this note was improperly given up to them by a third party, in whose hands it had been placed till the agreement should be carried out. The defendants joined in pleading, but it was agreed that the case should be treated as if issues had been joined by them severally.

At the trial at Cobourg, before *Hagarty*, J., the learned judge held that the same defence being pleaded by both defendants, and a defence that if successful must equally avail to both the parties to the record, neither could be received as a witness for the other, for the defence could not possibly be separated.

A verdict was found for the plaintiff for £156 9s. 10d.

Hector Cameron obtained a rule *nisi* for a new trial, for the rejection of evidence, to which *Cameron*, Q. C. showed cause.

ROBINSON, C. J.—The statute 5 W. IV., ch. 1, sec. 9, which was in force when this trial took place, provides, “that in every suit brought pursuant to the provisions of this act, any one or more of the defendants shall be entitled to the testimony of any co-defendant, as a witness in all those cases where the defendant or defendants calling the witness would have been entitled to his testimony had the suit been brought in the form heretofore used, and in no other case.”

Now, there is no doubt that if before this act, or at any time since, (for the maker and endorser may still be sued severally,) the maker and endorser were sued in separate actions in a case like the present, each might have called the other as a witness to prove any defence that he had set up. And granting this, it cannot be denied that the statute I have just referred to does literally direct that the plaintiff, by suing them in one action, under the power given by the act, could place them in no worse situation as regards their privilege of each calling the other as a witness. And it is

clear, I think, that the act must be applied with reference to the existing law of evidence, however it may have been altered. The language of the clause admits of that construction, and it is reasonable to suppose that the legislature intended that the plaintiff being allowed, and at the peril of costs *compelled*, to sue the maker and endorser in one action, should not thereby be placing them under any disadvantage in regard to their defence, for otherwise, while professing to favour the defendants by their enactment, the legislature might be subjecting them to serious injury. And so, on the other hand, it is equally reasonable to assume that the legislature did not intend, while they compelled the plaintiff at the peril of costs to sue both parties to the note in a joint action, to expose him to the risk of having his action defeated by evidence which would not have been admitted against him if he had proceeded against each in a separate action.

Now, if the maker and endorser of the note now sued on had been sued in separate actions, there is no doubt that each might have called the other as a witness for him upon an issue joined on the record, for such is the present state of the law; but then it is also true, that any verdict that he might obtain in his favour in such action upon the testimony of that or any other witness, would not be evidence for the other party to the note upon the trial of the separate action against such other party.

When both are sued in the same action, however, under the statute, the same jury is charged with both defences, and whatever evidence should satisfy the jury in the present case that the plaintiffs had themselves obtained the endorsed note from the parties to it upon a consideration which had totally failed, must inevitably operate directly in discharge of both the defendants, since they could not find the fact to be true for one purpose in the action, and refuse to act upon it for another purpose in the action as a fact proved. Whatever might have been objected against the endorser setting up in a separate action against himself a want of consideration as between the plaintiffs and the maker, would not, we may assume, apply in a case where both were defendants in the ac-

tion; and at any rate, issue having been joined upon this defence set up by the endorser, the question at the trial was not the sufficiency of the defence, but the truth of it; and when the endorser desired to prove his plea by calling the maker of the note as a witness, he did in effect call a party to the record to give evidence in his own favour, or, in other words, evidence which if believed must establish his own defence at the same moment that it established the defence of the endorser who called him. And so also would the effect be of allowing the endorser upon the trial to call the maker of the note to prove the truth of the defence which they had both set up.

This being clear, we must, I think, hold that the law which prevents a party to the record in a civil action being called as a witness in his own behalf, extends in spirit to prevent a party to the record from being called as a witness to support a defence which cannot be proved by him without his acquitting himself by the same testimony which, if believed, must acquit his co-defendant, otherwise there would exist an anomaly in regard to this kind of action, which it is certain the legislature could never have intended should exist. Here these two defendants were represented at the trial by the same counsel, and of course his object was to obtain the discharge of both. He might choose to say when he called the maker of the note, that he called him not to give evidence in his own favour, but to give evidence on behalf of the endorser, but when the effect of the evidence given must be the same, whatever might be passing in the mind of the counsel, or whatever he might choose to declare, it would seem a mockery to make the admissibility of the witness depend upon any inferences or explanations of that kind. And the question, therefore, is whether we ought not to consider that the first clause of 16 Vic., ch. 19, where it excludes any party to a suit individually named in the record from being called as a witness *in behalf of such party*, should not be applied where, as in the present case, we must see that he is individually called by his counsel in behalf of himself as much as if his counsel had called him directly and avowedly to give evidence in his own favour.

If we do not so apply the statute, then the defendants have this advantage under the statute 5 W. IV., ch. 1, that when two parties to a note are sued jointly, the plaintiff may be defeated in his recovery against both by the testimony of one of the defendants to the record given in his own favour, whereas if separate actions had been brought such an effect could not be produced, because a verdict for the defendant in the one case, on whatever evidence it might have been given, would not be evidence for the defendant in the other case. Still it must be admitted that the argument is strong on the other side, that the literal words of the statute are in favour of admitting the witness; and indeed the 16 Vic., ch. 19, cannot be said to have made a change in the law in this respect, so as to have repealed or altered the 19th section of 5 W. IV., ch. 1, for it does not in reality exclude the parties to the record from being witnesses in their own favour; it only leaves as it stood the principle of the common law which before excluded them; and the same question which is now raised in this case might have arisen at any time between the passing of the 5 W. IV., ch. 1, and the 16 Vic., ch. 19, as well as now.

My opinion is that the witness was rightly rejected, for the reasons I have given; though I have much doubt, because the plaintiff could sue both together or not, as he pleased, and if they had been sued separately, each could have called the other, but then the witness would not thus have discharged himself by his own testimony.

McLEAN, J.—Under the 9th section of 5 W. IV., ch. 1, the defendants contend that they were competent witnesses for each other; and that the evidence should have been received, though each would be giving evidence for himself and the other defendant at the same time. I think, however, that the acts of the legislature shew that it is not now contemplated that any person so situated can be a competent witness.

The act 12 Vic., ch. 70, sec. 1, (1849,) provides for the admission of all parties as witnesses in any suit, action or proceeding, civil or criminal, except "*any party to any suit,*

action or proceeding, individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate or individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively."

That section in the exceptions it contains shews, as it appears to me, conclusively that at the time it was passed the legislature did not desire that in any case parties should be competent to give evidence for themselves.

In 1851, by 14 & 15 Vic., ch. 66, the proviso containing the exceptions referred to was repealed, and all persons became competent witnesses, whether for themselves or others.

In 1852, during the very next session of parliament, by 16 Vic., ch. 19, after a little better than a year's experience of the provisions of the act removing all restrictions as to the competency of witnesses, that act was repealed, and it is provided that no person offered as a witness shall thereafter be excluded by reason of incapacity from crime or interest from giving evidence, but it restores the proviso repealed in 1851, that that act "shall not render competent or authorise or permit any party to any suit or proceeding individually named in the record, or any plaintiff, lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate or individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively, to be called as a witness on behalf of such party; but such party may, in any civil proceeding, be called and examined as a witness in any suit or action at the instance of the opposite party." By that section neither of the defendants would be a competent witness for the other, both being named in the record; but it is contended that the provisions of 5 W. IV., ch. 1, admitting the maker or endorser of a promissory note, when sued together, to be called as a witness for the other, has not been repealed, and that the defendants were entitled to

the benefit of such provision. It is, however, I think, very clear that the legislature, by the several enactments which have been passed, have come to the conclusion, and have distinctly shewn, that they do not consider it expedient that a witness shall at his own will and pleasure give evidence in his own case. The defendants if received as witnesses would not only be giving evidence each for the other, but actually to support his own pleas on the record, while nominally called for a different purpose. It would be absurd to allow either to be called for the other, when every word which either could utter would be directly in support of his own pleas, and at the same time subject to the strong influence which a party to a suit is supposed to feel, an influence which the legislature have shewn their desire to avoid by excluding such party as incompetent to give evidence.

On these grounds I think the witness was properly rejected, and that the verdict should not be set aside on that account.

BURNS, J.—I do not see that there is any force in Mr. Cameron's argument, that the effect of the Evidence Act, 16 Vic., ch. 19, is to repeal or override the act respecting several suits on promissory notes, 5 W. IV., ch. 1. In the first clause of the Evidence Act, after opening the door for the reception of witnesses almost if not quite indiscriminately, there is contained a proviso: that this act shall not render competent, or authorise or permit any party to any suit or proceeding, individually named in the record, to be called as a witness on behalf of such party, but such party may be called by the opposite party. This act was only providing for the cases which might come under its provisions; that is to say, after removing all restrictions, yet that in consequence of so doing the act should not be construed so as to render a party competent to give evidence in his own favour. I do not see that such a provision has the effect of repealing a previous act which did, in certain cases, render one defendant a competent witness for another defendant. When one defendant calls upon another defendant to prove the defence of the first, it may be to prove something which, if true, would

equally operate to the advantage of the witness, or it may be to prove something with which the witness has no connexion ; but the statute says that a party individually named in the record shall not be called on behalf of such party. I do not read this to mean parties, plaintiff or plaintiffs, and defendant or defendants, numerically, but to mean that no individual shall be competent to be a witness in his own behalf, leaving the law to stand as it was with respect to whether defendants might or might not be called as witnesses for each other.

I think this is quite plain when we consider that under the act 14 & 15 Vic., ch. 66, a defendant might go into the witness box and prove his own defence, and the act 16 Vic., ch. 19, repealed that act in express words, but yet was silent with respect to 5 W. IV., ch. 1. It would be against all the rules of construction to hold that the legislature had repealed an act by implication, when we see another act on the same subject repealed by express words. Of course, if the last act was inconsistent in its provisions with the previous act, then we should give effect to the last act ; but I see nothing in the Evidence Act inconsistent with the 5 W. IV., ch. 1. The question then is, what is the proper construction of the first act.

I am not aware the present question has ever before been presented to the courts, and yet it is singular that it should not have been, for surely there must have arisen cases in the course of nearly five and twenty years since the act passed, where a defence of two or more defendants has been rested on the same grounds. In this case the two defendants have united in their plea, but it was understood and agreed at the trial that the plea might be amended, and the defendants be allowed to plead separately. We are then to treat this record as if the defendants had severed in their defences, and that double issues were presented for trial, though those issues in truth presented only one fact to be determined.

There is no doubt that if the plaintiff had sued the defendants in separate actions, each might have been called for the other to prove the very defence appearing on the record. The 9th section preserves to the defendants when sued jointly

the right to the testimony of co-defendants, if each would have been entitled to the testimony of the other if separate actions had been brought. We do not find the legislature conferring a new right upon the parties, but find that they were carefully preserving the rights which they had before that act was passed. There is nothing destroying that right so far as enacted by the legislature, and whether the defendants who are responsible in different characters may destroy it by their joining in one and the same defence under the same plea need not be discussed in this case. The legislature did not take away the right of the plaintiff to sue the parties separately, but abolished the right to claim costs in each separate suit, as would have been done before, and to that extent the act of parliament is a restrictive provision on the rights of plaintiffs. That provision cannot be used as an argument, if defendants are careful to defend themselves, each upon his own ground, to establish that in a suit against several defendants liable in different characters they should not be witnesses for each other; because the effect of that would be to give a new right to plaintiffs they never had before, and at the same time would render the preservation of the defendants' rights an insensible provision.

The only argument which it appears to me can possibly be used for excluding defendants who raise issues like the one upon this record, is that a defendant called by another defendant to prove the truth of his defence at the same time gives evidence to establish his own, and that it may be impossible for a jury, if they believe the evidence to discharge one defendant, to discard from their minds the evidence when dealing with the other defendant. There is great force in that position, no doubt, but we must suppose the legislature foresaw that difficulty imposed upon plaintiffs in depriving them of costs in more suits than one. It was every day practice to call a witness to establish a defence for a defendant, which if true would equally discharge the witness from liability; but then another jury must be impanelled, and another trial had in respect of the defence of the witness. When the legislature united the defendants in one suit, and permitted them to be witnesses for each other before one

and the same jury, we must give them credit for believing they supposed juries would discriminate in their minds as to the evidence, and receive it for one defendant and reject it for the other ; that is, not reject it altogether, but apply the evidence to the case of the defendant on whose behalf it was given, and not act on it with respect to the other defendant. Judges would draw that distinction in the administration of justice, but I am well aware that it is next to impossible to get a jury to do it. The only way to meet the difficulty, if that would meet it, would be, after the jury are sworn, to give the case to the jury separately and distinctly as to the different defendants, telling them to determine the case of one defendant before the case is submitted to them with respect to the other defendant.

Whatever difficulties are presented in dealing with such cases before juries, I cannot allow that consideration to influence my mind in the construction of an act which seems to me to be perfectly plain. It must be assumed the legislature was aware of the consequences which would follow upon the alteration of the law, and that an account of the advantages and disadvantages to all parties, both plaintiffs and defendants, was made, and that the balance was in favour of their enactment. Judges can only tell juries how and in what manner they should apply the evidence with respect to any one defendant, and that such evidence is in fact not evidence for another defendant, and should not be acted on, but if juries will disregard such directions all that can be said about it is, that the blame must rest with the legislature in placing juries in that position.

I think the witness should not have been rejected, but should have been received.

Rule discharged, *Burns, J.*, dissenting

DALYE v. ROBERTSON.

Lease—Construction—Estate for life or for term of years—Merger—Sale under execution—Forfeiture.

Defendant on the 13th of October, 1852, granted the land in question to one S., to hold "to the said S., and the heirs of his body, for twenty-one years, or the term of his natural life, from the 1st of April, 1853, fully to be complete and ended," but not to be underlet to any person except to the family of the said S. for any period during the said term. A yearly rent was reserved, which S. covenanted to pay, and it was provided that on failure to perform the covenants the lease and the term thereby granted should cease and be utterly null and void.

The lessee entered, and on the 1st of April, 1859, a year's rent being in arrear, defendant distrained and sold the goods of S., who remained for some time on the premises as defendant's servant; and the sheriff afterwards under executions which had been in his hands since November, 1858, sold the unexpired term of S. in the premises, describing it as a term with fifteen years yet to run, at a rent of \$100 a year. The plaintiff became the purchaser, and brought ejectment against defendant on the sheriff's deed.

Held, that by the lease S. took a life estate, in which the term merged, and he therefore had no interest which the sheriff could sell under the *fi. fa.* against goods.

Per Robinson, C. J., the sheriff's deed would at all events have been inoperative, owing to the misdescription of the interest which S. held in the land, and of the amount of rent.

Per McLean, J., the plaintiff's title also failed, on the ground that the lease being void by the non-payment of rent, and S. having given up possession by arrangement with defendant, his interest was gone.

EJECTMENT for the south 150 acres of lot 3, in the 7th concession of the township of Hope.

The plaintiff claimed under a deed from the sheriff, dated 12th September, 1859, professing to convey the unexpired term of 15 years in a lease granted by the defendant to one Robert A. Stewart, at a rent stated in the conveyance to be £35 per annum.

It was agreed at the trial that a verdict should be entered for the plaintiff, subject to the opinion of the court on a case stated as follows:—

The lease from the defendant Robertson to Stewart, under which the plaintiff claimed as purchaser at sheriff's sale of Stewart's unoccupied term, was made on the 13th of October, 1852. By it the defendant granted to "Robert A. Stewart, and the heirs of his body, the south 150 acres of lot No. 3, in the 7th concession of the township of Hope, to have and to hold the same, with all the privileges thereof, to the said Robert A. Stewart, and the heirs of his body, for twenty-one years, or the term of his natural life, from the 1st of April, 1853, fully to be complete and ended, but not to be underlet

to any person or body whatsoever, except to the family of the said Robert A. Stewart, for any period during the said term,"—subject to the payment of the yearly rent of £35 for the first four years of the said term, and also the sum of 10s. per acre in addition for every acre cleared by the said Robert A. Stewart, after the same has been cleared four years, payable on or before the 1st day of April in each year. The lease contained covenants on the part of Stewart, for himself, his heirs, executors and administrators, with the defendant, his heirs and assigns, well and truly to pay the said rent according to the said terms, to cultivate the said farm in a husband-like manner, not to underlet the same except as aforesaid, to maintain and keep the fences in good repair, and to leave the same in such good repair at the expiration or other end of the said term, and pay all taxes and assessments thereon during the term. And it was agreed between the parties that upon failure in performing each and every of the covenants and agreements on his part to be performed, the lease and the term thereby granted should cease and be utterly null and void, and further, that performing the said covenants and agreements the said Robert A. Stewart, and the heirs of his body, should and might at all times during the said term have and enjoy the said premises. And the defendant Robertson covenanted with Stewart to pay the sum of £100 for building a dwelling house on the premises, if the said dwelling house at the expiration of the said term should be worth the same at a valuation.

After the making of this instrument the lessee entered and cleared twenty acres of the land, which had been cleared four years before the 1st of April, 1858. The amount of rent, therefore, due on the 1st April, 1859, was £45, being £35, a year's rent at the rate payable during the first four years, and £10, or 10s. per acre for the land cleared, which amount being unpaid, the defendant, on the 15th of June, 1859, gave notice to the sheriff of that amount being in arrear.

The sheriff had received on the 27th of November, 1858, an execution in favour of John Might against Stewart; an execution in the case of Watt v. Stewart, on the 30th of April, 1859; an execution of Riordan v. Stewart, on the 21st of

May, 1859, and an execution McDonald v. Stewart, on the 8th of June, 1859.

In May, 1859, the sheriff's bailiffs seized the cattle, farming utensils, &c., on the premises on the execution at the suit of Watt, and took security from Stewart and another for the production of the property when required.

On the 1st of August, 1859, warrants were issued on the other executions, but on the 6th of July the defendant had issued a warrant as landlord to distrain the goods of Stewart for the rent in arrear, under which the goods had been sold; but the defendant having himself become the purchaser the goods were allowed by him to remain on the premises.

On the 1st of August the bailiff removed the chattel property seized on the 31st of May to Port Hope, and sold it. Stewart left the premises immediately, and did not return.

The sheriff never had possession of the lease from defendant to Stewart, but on the 1st of September, 1859, he advertised for sale the unexpired term of a lease from defendant to Stewart for the premises in question, with fifteen years of the term yet to run subject to a rent of \$100 a year; and he sold under that advertisement, and conveyed to the plaintiff.

From the time of the sale of Stewart's goods under defendant's warrant to distrain, about the 13th of July, Stewart continued on the premises up to the 1st of August, but was employed by the defendant as his servant, and held possession only in that character. The property distrained sold for £21 18s. 4d., and the rent, except as to that sum, remained unpaid.

The defendant objected that nothing passed to the plaintiff by the sheriff's deed, on the following grounds:—

1. That the interest of Stewart was a freehold, and could not be sold under a writ against goods and chattels.

2. That the term had been forfeited by non-payment of rent on the 1st of April, 1859, and defendant was entitled to insist on such forfeiture.

3. That the effect of the seizure and sale by the sheriff was to avoid the lease, as a breach of the condition and covenant against underletting, and against allowing the possession to leave the family of Stewart.

4. That the sheriff's deed was inoperative, by reason of misdescribing the interest professed to be conveyed in the duration of the term, which was for the life of Stewart, and not merely for fifteen years, and as to the amount of rent, which was £45 and not £25.

5. That Stewart had not any interest in the land which he could convey, except to some of his own family, and therefore none which was bound by the judgments, or which the sheriff could sell on execution.

Cameron, Q. C., for the plaintiff, cited Consol. Stat. U. C., ch. 90. *Doe Mitchinson v. Carter*, 8 T. R. 57; *Platt on Leases*, I. 975; 3 Wils. 234; *Doe Lockwood v. Clarke*, 8 East 185; *Roe v. Galliers*, 2 T. R. 140.

Bethune, contra, cited *Doe Henniker v. Watt*, 8 B. & C. 308; *Walker's case*, 3 Rep. 24; *Grant v. Lynch*, 14 U. C. R. 148; *Blades v. Arundale*, 1 M. & S. 713; *Ackland v. Paynter*, 8 Price 95; *Palmer v. Humphrey*, Cro. Eliz. 584; *Platt on Leases*, 678; *Bishop of Winchester v. Wright*, 2 Ld. Raym. 1056; *Palmer's case*, 4 Rep. 64; *Brewer dem. Onslow v. Eaton*, 3 Dougl. 230; *Nuttall v. Staunton*, 4 B. & C. 51; *Dann v. Spurrier*, 3 B. & P. 402.

ROBINSON, C. J.—The first point made in the case on the part of the defendant, as an objection to the plaintiff's title, was that the interest of Stewart was a freehold, and could not be sold under a writ of *fiery facias* against his goods and chattels. It is upon this objection and the fourth, I think, that the case turns, for there is nothing in the second, third, or fifth objections taken by the defendants, that would create any difficulty in the way of the plaintiff's recovery.

As to the first objection: the lease made by Robertson to Stewart, to hold to him and the "heirs of his body" for the term of twenty-one years, shewed plainly the intention to be that the term of twenty-one years should continue without being subject to cease upon the contingency of the lessee dying within the term. The words "heirs of his body" shew this clearly, although they are insignificant so far as regards any legal effect they would have upon the term after

the lessee's death; for a chattel interest of this or any other description cannot be entailed, and will not go to the heirs, either general or special, of the lessee, under any form of words that may be used in the demise. His executors or administrators will take it upon his death, although no mention of them is made in the deed, and they will equally take the interest although the demise may have been made expressly to the lessee *and his heirs*. The words of inheritance, therefore, used in this lease are of no effect, further than to shew that the lessor intended the term of twenty-one years to run out although the lessee might not live to enjoy it to the end, for otherwise there could be no possible occasion to insert any words of the kind; they could not have been used with any reference to the life estate afterwards given to the lessee, because that estate must necessarily cease on his death whenever it occurred.

The intention undoubtedly, I think, was to grant a term of twenty-one years certain, and that if the lessee should survive the expiration of that time, he should continue further to enjoy till his death, so that the interest might continue longer than the twenty-one years if the lessee lived longer, but should not cease till the end of that term, whether the lessee might or might not be then living.

I had expected to find that such an intention might be carried out, without being defeated by the term for years being held to be merged in the freehold estate for the lessee's life. But it seems to be otherwise held, notwithstanding as a general rule we find it laid down in many cases that merger depends upon intention.

In Co. Lit. 54 *b*, it is said, "If a man letteth lands to another for life, the remainder to him for twenty-one years, he hath both estates in him so distinctly as he may grant away either of them; for a greater estate may uphold a lesser, but not *è converso*; and therefore if a man make a lease to one for twenty-one years, the remainder to him for the term of his life, the lease for years is drowned."

The late Mr. Preston, the weight of whose authority on questions relating to the law of real property will be readily admitted, has treated the law of merger more fully

than it can be found discussed by any other writer. In the third volume of his work on conveyancing, he has a chapter (5th) devoted to the enquiry whether merger depends upon the intention, and his conclusion is that, in a case like that before us, the law of merger will prevail against what he considers must be the evident intention of the parties in every such case. "It had been determined," he says, (Vol. III., p. 44, 1st ed.) "that when a lease for years and a remainder for life were limited to the same person by the same deed, the estate for years should merge in the estate for life. Now this conclusion is in direct opposition to the clear and express intention, for unless the parties meant that the limitation for years and the limitation for life should give distinct and subsisting interests, and that the estate for years should continue notwithstanding the determination of the estate for life, to what purpose did they introduce the limitation for years into the instrument? An intention to give an estate for life, and no longer, would have been completely answered at that time, as it would at this day, by a grant for that period. The limitation for years clearly and distinctly proves an ulterior intention. This mode of limitation was unquestionably framed to give to the party not only an estate for life, but for the years, thus providing against his death within the period of years. It amounted to a stipulation that there should be a subsisting interest for the residue of the time of those years, notwithstanding the death of the life within the period of the years; and its object was to secure to the lessee an interest, positively and with certainty, for the life, and also for the years, if they should not expire during the period of the life. The limitations are good in point of law. The *mode* of limitation, however, was informal, and judging from the determination in that case was improper. That the intention does not decide the application of the law of merger, and that the rule of law takes place, in some instances, at least, without regard to the intention, is abundantly proved by the determination applicable to the circumstances which have been stated."

Following up the subject, Mr. Preston adds, at page 47, "That the limitation for the term of years and for life might

have been penned in another form, capable of operation, in a mode which would have excluded all grounds for the application of the law of merger, and at the same time have expressed the precise and particular intention of the parties. To have granted an estate for life, with a remainder for years, to be computed from a given period, for example, from the day next before the death of the indenture, would have accomplished every part of the intention. A limitation in this mode, at the same time that it would have given full effect to the intention, would have preserved the chattel interest from the influence of merger. The lessee would certainly have been entitled to hold the land for his life; and the term of years would have been a continuing estate in the event of his death within the period of a limited number of years. Except by vesting one of the estates in a trustee, no other mode of limitation would have been consistent with the intention, and have preserved the term of years. But this form would have been free from objection. The term for years could not by any possible event have merged in the estate for life, because the estate for life was prior to the term for years, and a remainder cannot merge in the prior particular estate."

These observations of Mr. Preston, I think, are directly applicable to the case before us; and they shew that, in his opinion, the term for years, when it becomes an estate in the same person to whom the life interest was granted by the same deed, must be held to have merged in the higher estate.

I do not think that there is room here for the application of the doctrine relied upon in the argument, that as a freehold estate cannot be made to commence in *futuro* the demise of a term for life was in this case void, for this is the common case of a remainder, which in the nature of things must await the termination of the first estate before it can become an estate in possession; nor do I think any difficulty is created by the circumstance that the term for years in this case was not to commence for some months after the making of the lease. As soon as it did commence, and the lessee had entered, he was tenant for a term of years, with remain-

der for life, and the lesser interest, as it appears we must hold, merged in the greater at the moment when the same person held both.

Then Stewart having a term for life, and that only, he held such an interest as could not be sold under a *fi fa.* against his goods; and on his first objection to the plaintiff's title I think the defendant is entitled to prevail, so that our judgment must be for the defendant.

And in my opinion the defendant was also entitled to prevail on the fourth objection, on the authorities cited by his counsel, or rather would have been entitled to prevail on that objection if we could have held that Stewart had a term for years which could have been sold under the *fi. fa.*, for the sheriff did not sell such a term as Stewart in that case would have held, but something substantially different from it in the amount of rent reserved.

As to the first point, I have not looked upon the lease as granting a term for twenty-one years or for life, as the lessee might choose, for annexing words of inheritance to the grant of the term shews plainly, I think, what the lessor meant by the whole taken together, and the lessee clearly did not mean, if he knew the law, that a lease for life should pass at once by the deed; for then we must see that that would have been the grant of a freehold to commence in *futuro*, which could not be.

McLEAN, J.—By the deed the sheriff, as far as he lawfully can or may by virtue of his office of sheriff, doth grant, bargain, sell, assign, and set over unto the plaintiff, his executors, administrators and assigns, all and singular the unexpired term of the lease from the defendant to Robert A. Stewart, with *fifteen* years yet to run, of part of lot No. 3, in the 7th concession of Hope, subject to a rent of one hundred dollars per annum, to have and to hold to the plaintiff and his executors, administrators and assigns, to his *and their own use for ever*.

The sheriff does not seem to have been aware at the time of the sale of what he was selling, for he seems to have been ignorant of the term and of the amount of rent to be paid.

He only professes to sell as a chattel an unexpired term of fifteen years to run upon the lease, and for a rent very considerably below the true amount. The lease, however, is to Robert A. Stewart, and the heirs of his body, for twenty-one years, *or the term of his natural life*. Now these words, "or the term of his natural life," must have some signification, and if any is to be attached to them, they must mean that if Stewart lived longer than twenty-one years, he was to enjoy the premises on the terms stated as much longer as he did live. The lease is to him *and the heirs of his body* for twenty-one years certain, so that should he not survive for the whole period of twenty-one years, the heirs of his body shall be entitled to hold for any portion of that term unexpired at the time of his death. It would have conveyed a life estate to Stewart if nothing had been said as to the holding for twenty-one years, and that cannot limit the estate conveyed to him, but has the effect of assuring the lease to the heirs of his body for twenty-one years, in the event of his death, on the same terms as he might hold it himself during his natural life.

The estate of Stewart, then, being a life estate, could not be sold on execution against goods and chattels.

But there is another ground on which, as it appears to me, the 'plaintiff must fail. By the terms of the lease the defendant was at liberty to re-enter the premises on failure by Stewart to perform the covenants and agreements on his part; or, rather, the lease according to the terms of it *became utterly null and void to all intents and purposes* by reason of such failure.

The rent became due on the 1st of April, 1859, and was not paid when the warrant to distrain for the amount was issued, on the 6th of July, 1859. That failure to pay rent rendered the lease according to the agreement utterly null and void, and the term thereby granted ceased. The issuing of the warrant to distrain for rent due up to the 1st of April could not resuscitate the lease, or operate as a waiver of defendant's right to treat the lease as at an end, as might be the case if rent were accepted which accrued subsequently. The defendant and Stewart were entitled, as it appears to

me, to make any arrangement with respect to the surrender of the premises in consequence of the lease having become void by reason of the non-payment of rent. An execution in the sheriff's hands against goods would bind the property if it were merely a chattel interest for a term of years belonging to Stewart, but the moment a forfeiture took place, and Stewart's interest was gone, an execution even against lands must cease to bind the premises. From the 13th of July Stewart was acting as a servant of defendant on the premises, and from that time did not claim or exercise any right under his lease, which in fact had been forfeited and had become void before any seizure of his effects under execution had taken place.

It is competent for a lessor to attach any stipulations which he may think proper to a lease of his land, and if it be agreed between the lessor and lessee that a lease shall become absolutely null and void by reason of non-payment of rent, and such rent notwithstanding remains unpaid, and the lessor and lessee then agree that the lease shall be given up and the premises surrendered, I cannot see that any execution against the lessee can deprive them of the right of making an arrangement which they contemplated when the lease was entered into, and which the lessor would have it in his power to enforce even against the will of the lessee.

On these grounds I think the plaintiff is not entitled to succeed in this action, and that the *postea* must be given to the defendant.

BURNS, J.—It appears to me the proper answer to be given to the first question put in this case, decides it in the defendant's favour.

The words "to the said Robert A. Stewart and the heirs of his body for twenty-one years," do not operate as a limitation, for the words *heirs of his body* would give them no estate whatever in the remainder of the twenty-one years, in case Stewart should die within that period. If that event were to happen, supposing there were a term of twenty-one years created, the remainder would go to the personal representatives of Stewart, and not to the heirs of his body, for it is a

principle of law that a term for years cannot be limited to a man's heirs. The introduction of these words can then have no legal bearing upon the construction of this instrument.

Then reading the words "to the said Robert A. Stewart, for twenty-one years, or the term of his natural life, from the 1st of April, 1853, fully to be complete and ended," with the fact that the deed was executed in 1852, what estate did Stewart take—a term for twenty-one years, or an estate for life? If the words limiting a commencement of the estate were omitted, I apprehend there could be no question upon the subject, that Stewart would take an estate for his life, as being a freehold and the larger estate. Where houses were leased to one for twenty-one years, and afterwards were devised by the lessor to the lessee for life, the question was, whether the lessee had taken under the devise, for if so, the estate for years merged in the greater estate for life, (Colbourn and Mixtone's case, 1 Leon. 129.) Now here no question of that kind can be raised, for the term is attempted to be created in the same instrument which gives the life estate, and therefore, the tenant having entered and being possessed, the inevitable inference is that he takes whatever estate is given by the deed, and as there can be no estate for years carved out of the estate for life to one and the same person, existing at one and the same time by the same instrument, it follows that his estate must be for life. Very likely the parties intended, by the introduction of the words *heirs of his body*, that Stewart should, together with his heirs, have an estate for twenty-one years at all events, but we cannot consistently with legal principles governing estates hold it so in this case. By holding that Stewart took a life estate, it might happen that there would be less benefit arising from that than from a term for twenty-one years, in case of his death within that period; but then, on the other hand, he might live very much longer than the twenty-one years, and thus might have a greater benefit. The principle, however, that an estate for years merges in an estate of freehold, when united by the act of the parties, and not cast by operation of law, must govern this case.

The remaining question is whether limiting the estate to commence *in futuro* has the effect of cutting down the estate

for life, which the tenant would take if that were omitted, to the twenty-one years mentioned in the deed. It is to be observed that this case is not like that of *Dann v. Spurrier*, (3 B. & P. 399,) for there it was all one estate—that is, for years—and the question was whether the tenant should take for seven, fourteen, or twenty-one years; but the question is, which of two estates shall exist, that for years or for life, they being incompatible with each other at the same time. No doubt the old law was that no estate of freehold could be conveyed to commence *in futuro*. The reason for that was the distinction between corporeal and incorporeal hereditaments: corporeal hereditaments required to be transferred by livery of seisin, and until livery no estate passed. The courts held, however, that although a feoffment were made months before the time of livery being made, yet that when livery was made the estate would pass from that time, and in the mean time the feoffor held the estate until that act was done, and held that there was no abeyance of the freehold in the interval. *Freeman dem. Vernon v. West*, (2 Wils. 165;) *Roe dem. Heale v. Rashleigh* (3 B. & Al. 156.) A term for years might be created to commence *in futuro*, for that was an incorporeal hereditament, and required no livery to support it, and therefore lay in grant, as it was said. It was always held that a grant accompanied by an attornment by the tenant was as effectual as a feoffment with livery. The 4 Anne, ch. 16, sec. 9, did away with the necessity of attornment, and now by our statute 14 & 15 Vic. ch. 7, passed before the deed in this case was made, the distinction in case of corporeal hereditaments lying in grant and in livery is abolished. The effect of this I take to be that of placing corporeal hereditaments upon the same footing with incorporeal hereditaments. A feoffment might before the act be made without deed, but a grant could not be without deed. Now they are put upon the same footing, as regards the conveyance of the immediate freehold: in both cases it is required to be done by deed.

The only difficulty, it seems to me, is the expression in the act, the *immediate freehold*. If the word *immediate* had not been used, I conceive there could not have been any doubt upon the subject. I do not imagine the legislature contem-

plated by the statute that the freehold should be in abeyance any more than it ever was by law before the act; on the contrary, I think it was intended to leave the law upon that point unaltered. Then we see the law was, before the act passed, that a person might convey corporeal hereditaments, and yet be held to have the freehold in him until livery of seisin were given, and we see that a grant of incorporeal hereditaments might be made by deed to take effect *in futuro*. I see nothing inconsistent with the statute in holding in this case that the grantor was seised of the freehold until the day arrived for the grantee to enter, and when the grantee did enter then he would be in for an estate for life under the deed. The freehold was not in abeyance at all, for the tenant for life had no right to enter before his estate would commence, and when it did commence by entry then the freehold was immediately transferred to the tenant for life, with the reversion to the lessor or his heirs. If the grantee had died before the day arrived for him to enter, then no estate arose at all, and if he had died the very day after he entered all that can be said is that the particular estate had ceased, and the grantor or his heirs would be in again as of the former estate.

It seems to me the execution debtor was possessed as of an estate for life, which could not be sold upon an execution against goods and chattels, and therefore judgment should be entered for the defendant.

Judgment for defendant.

THE BANK OF UPPER CANADA V. TARRANT.

Verbal lease—Action for rent—No occupation by tenant.

The plaintiffs' agent offered to lease a house to defendant at £100 a year, payable quarterly, and defendant assented to the terms, but never occupied. *Held*, affirming the judgment of the county court, that he was not liable for the rent.

After the argument an affidavit was put in, made by one of the witnesses examined at the trial, stating that after the defendant had been told what the rent would be he got the key by the agent's directions and went to examine the house, and leaving the key in the door returned and said he would take it. This evidence was not reported in the appeal books, and the witness did not swear that it was given at the trial.

The court refused to act upon the affidavit; but, *semble*, that the facts stated in it could not have altered the decision.

APPEAL from the county court of Hastings.

Declaration, that defendant rented from the plaintiffs certain premises for one year, and agreed to pay them the yearly rent of £100, payable quarterly, but did not pay the first quarter's rent; with a count for use and occupation.

Pleas.—1. That the defendant did not promise as alleged. 2. To the first count, that he did not rent the said premises as alleged.

The following is the evidence given in the court below, as reported by the learned judge.

J. W. Turner, sworn.—I know defendant; I saw him renting some premises from the agent, Holden, at £100 per annum, rent to commence from the 12th of July last: agreement made in June or the first of July; tenant to pay all taxes; payable quarterly. Defendant talked about starting a boot and shoe shop or grocery; they are vacant; the bargain was made opposite Martin's store.

Cross-examined.—They spoke about a lease to be drawn up at a future time; defendant has not occupied at all.

Erastus Holden.—I am agent for plaintiffs here; I rented those premises to defendant at said time, between the 20th and 30th of June, rent £100 per year and taxes, payable quarterly, from the 12th of July last: he has not paid: I had applications after; I told them I could not let them, as they were rented to defendant, and I notified defendant, who has left town.

John P. Morden, sworn.—I gave defendant notice that the Bank held him responsible.

The defendants' counsel objected:—1. That the agreement was void, under the statute of frauds, not being in writing. 2. That defendant was not liable for rent until he made entry.

Leave was reserved to move to enter a verdict for defendant on these grounds, and a verdict was rendered for the plaintiff.

A rule *nisi* having been afterwards obtained in pursuance of the leave reserved was made absolute, and the plaintiffs appealed.

O'Hare, for the appellants, cited *Mechelen v. Wallace*, 7 A. & E. 49; *Edge v. Strafford*, 1 Cr. & J. 391; *Platt on Leases*, II. 5; *Add. on Con.* 371-2; *Browne on the Statute of Frauds* 34, 37, 229.

Wallbridge, Q. C., contra, cited *Smith on Contracts* 13; *Doe Bromfield v. Smith*, 6 East 530; *Rawson v. Eicke*, 7 A. & E. 451; *Vaughan v. Hancock*, 3 C. B. 766.

ROBINSON, C. J., delivered the judgment of the court.

We think this case has been rightly disposed of in the court below.

The case of *Edge v. Strafford*, (1 Cr. & J. 391,) on which the learned judge founded his judgment, is very much in point. The agent of the plaintiffs had according to the evidence told the defendant on what terms he could have the house in question, namely, at the rent of £100 for a year. The defendant assented to the terms, and talked of having a lease drawn up, but none was drawn, which is not material, as a verbal lease for a year would be equally valid; but the objection to the plaintiff's recovery is that the defendant, according to the evidence, never occupied at all. There was therefore no enjoyment, only an *interesse termini*, and nothing to support an action, either for rent as upon a demise, or for use and occupation; and no action could be supported upon an agreement to become tenant, for that would require, under the Statute of Frauds, that a written agreement should be produced, and there was none.

If it had been shewn that the defendant had entered under the verbal lease, that would have been sufficient, and it would have been of no consequence that he afterwards removed, and left the premises vacant.

The plaintiff's attorney has since the term sent up an affidavit, made by a witness who was examined at the trial, stating a fact which does not appear in the judge's notes of the evidence, and what the witness does not swear that he stated upon the trial. We cannot act upon such an affidavit. It would open a door to a very inconvenient practice. The attorney should take care that the evidence is fully reported, and for all that this affidavit states it may have been done in this case.

But after all, the fact which is now irregularly stated in an affidavit could hardly have made any difference in the case. It is merely this: that after the plaintiffs' agent had told the defendant what the rent would be, the defendant got

the key by the agent's directions, and went and looked at the house, and leaving the key in the door returned to the agent and told him he would take it. That could hardly be held to be an entry under the lease.

We think the verdict was properly rendered for the defendant.

Appeal dismissed with costs.

BROWN ET AL V. PAXTON ET AL.

Bond to the limits under 16 Vic., ch. 175—Effect of—Action by assignee of sheriff—Measure of damages.

In an action by the assignees of the sheriff against the sureties of one S., on a bond to the limits given under 16 Vic., ch. 175.

Held, 1. That the bond continued in force after the expiration of the thirty days, and might be assigned and sued upon for a breach committed by departure after that period.

2. *Burns*, J., dissenting, that the plaintiffs were not entitled as of course to the full amount of their debt and costs, but only to the loss actually sustained by the breach; and that in this case, as it was proved that the debtor was insolvent from the time of his arrest till his death, the verdict should be reduced to nominal damages.

Calcutt v. Ruttan, 13 U. C. R. 220, commented upon.

ACTION upon a bond to the limits.

On the 13th of April, 1855, these plaintiffs recovered a judgment in this court against Thomas Salmoni, upon which a *ca. sa.* issued, and Salmoni was arrested on the 10th of June, 1856; and on the 16th of June gave bail for the limits, by a bond with the usual conditions, the defendants being the securities. The plaintiffs charged that Salmoni departed from the limits on the 5th of June, 1858, and that on the 13th of September following the sheriff assigned the bond for the limits to them, upon which they sued in this action.

The writ had been endorsed for £317 17s. 7d.

In a second count the plaintiffs averred that Salmoni on several occasions departed from the limits, and went into the State of Michigan.

The defendants pleaded—1. Traversing the departure from the limits.

2. To the first count, that Salmoni, by order of the speaker of the House of Assembly, (by his warrant) was

ordered to depart from the limits, for the purpose of attending and being examined as a witness before the House of Assembly, then sitting at Toronto: that he did, by virtue of that warrant, depart from the limits, and in accordance therewith remained absent ten days for the purpose of obeying the said warrant, and not in any way voluntarily or on his own account; that he returned to the county of Essex as soon as he was discharged from the speaker's warrant; and that, except on that occasion, he never departed from the limits.

3. To the last assigned breach he pleaded that he never departed as in the second count was alleged.

The plaintiffs joined issue on all the pleas, besides demurring to the second plea, on which judgment was given in their favour. (a)

At the trial, at Sandwich, before *McLean*, J., it was proved clearly that Salmoni did depart from the limits, and upon occasions and for purposes with which the Speaker's warrant had nothing to do, if that would have excused him; and it was found, on the other hand, by the jury, that he was insolvent from the time of his arrest till his death, which took place while in custody upon the limits, and had no means of paying the debt.

A verdict was given for the plaintiffs for £414 14s. 1d. the whole amount for which Salmoni was in execution with interest, leave being reserved to move to reduce the verdict to nominal damages only.

Prince, for the defendants, obtained a rule *nisi* to enter a verdict in their favour, or to reduce the verdict for the plaintiffs to nominal damages only, pursuant to leave reserved, on the ground that the execution debtor, Salmoni, was proved to have been insolvent from the time of his arrest until his death; or for a new trial, on the law and evidence, and for misdirection, the bond and assignment being insufficient, and the departure from the limits involuntary, and the debtor having immediately returned to the limits and

(a) See the demurrer reported, ante, page 238.

remained there till his death. He cited *Arden v. Goodacre*, 11 C. B. 371; *Calcutt v. Ruttan*, 13 U. C. R. 220.

Eccles, Q. C., shewed cause, and cited *Bonafous v. Walker*, 2 T. R. 126.

ROBINSON, C. J.—There was no leave reserved for applying to enter a verdict for the defendants, but only for moving to reduce the verdict to nominal damages, if the court should be of opinion that less damages than the whole debt and costs could properly be given by the verdict in such a case.

The defendants' counsel has contended that the jury were not bound to give the whole debt, but only such damages as they found the plaintiffs to have sustained from the breach; and further, that a bond for the limits taken by the sheriff, as this was, upon the arrest of the debtor, could only be in force for thirty days, according to the law in such cases, and that the sheriff can neither sue on such a bond nor assign it on account of a breach by the debtor in departing after the thirty days.

No such objection, however, as that last stated is mentioned in the rule, and it does not appear to me that there is any good ground for holding that the bail who entered into the bond now sued upon under the statute then in force, 16 Vic., chap. 175, secs. 7 and 8, are not liable longer than for one month. They continue liable, I think, until something is shewn to have been done which would discharge them from liability. It does not appear that a recognizance was afterwards entered into under the 10 & 11 Vic., ch. 15, sec. 5.

We have first to consider whether upon the pleadings and evidence the plaintiffs, as assignees of the bond to the sheriff for the limits, can properly be allowed to recover in this action any damages whatever, for it has been contended that they cannot. And if they *can* properly recover, the next question that has been raised is, whether the plaintiffs must inevitably be entitled to recover the whole debt for which *Salmoni* was in execution, notwithstanding the admitted fact that from the time of his arrest till his death *Salmoni* was altogether insolvent.

Upon the first point, I do not see any good ground for doubt. Salmoni it was fully proved, did voluntarily depart from the limits when he had no such excuse for his departure as the alleged warrant of the Speaker of the House of Assembly. These defendants, who had bound themselves that he should remain upon the limits, were liable for such voluntary departure, and liable, as I have already stated, for a departure of the debtor after the lapse of a month from their entering into the bond, as well as for a departure before ; though if they had within the time limited delivered to the sheriff a certificate of a recognizance of bail having been given, with proper affidavits of justification, as provided by the 8th section of the statute 16 Vic., ch. 175, then in force, or if the sheriff in consequence of no such certificate having been furnished had committed the defendant to close custody, as he might have done under the same 8th section, (but was not bound to do,) then no doubt these defendants would have been relieved from the obligation of their bond, or at least would not have been liable for any subsequent departure from the limits.

When I say that the sheriff was *not bound* to commit the debtor to close custody because a certificate of a recognizance had not been produced to him within thirty days, I am aware that in the case of *Calcutt v. Ruttan*, (13 U. C. R. 220,) my brother judges in this court seem to have taken a different view of the statute 16 Vic., ch. 175, in that respect. I was not present at the argument of that case, and should have more hesitation in expressing a difference of opinion upon any point that was disposed of in it, but that the learned judges who gave the judgment evidently had doubts upon the proper construction and effect of the statute, and declared that they had much difficulty in coming to the conclusion which they pronounced.

For my own part, with much deference to my learned brothers, I take this view of the statute 16 Vic., ch. 175, sections 7 and 8. If at the end of one month after the execution of the bond given in the first instance to the sheriff for the limits no certificate of recognizance, &c., had been produced to the sheriff, he was then called upon, I think, to

consider that he had the bond of parties whom he had been content in the first instance in his discretion to accept as sufficiently responsible to secure him from risk during the month, within which the defendant was bound to procure and produce to him a certificate of a recognizance of bail with proper affidavits of justification, according to the 5th section of 10 & 11 Vic., ch. 15, or else be subject to be committed by him to close custody; but, although in consequence of no certificate being produced to him, he might, under the 8th section of 16 Vic., ch. 175, commit the party to close custody, "there to remain as if no such bond had been given," yet he was not by the language of that clause bound to do so; and if he did not choose to commit the debtor, the bond which he held would still be obligatory upon the securities, for it was absolute in its condition that the debtor should not depart from the limits, but should surrender himself immediately to custody *upon a rule of court* being made for that purpose, and was not qualified by any limitation as to time, or by any reference to the contingency of the debtor obtaining or not obtaining a recognizance from the same or other securities. The sheriff might at his peril, I think, continue to rest upon the security of the bond, and need not avail himself of his right to commit the debtor to gaol. And as there certainly is nothing in the condition of the bond given in such cases which relieves the sureties from their obligation at the end of a month, or at any time while the debtor shall not be in gaol, but shall be remaining upon the limits, so there is not in my opinion any thing in the statute which deprives the sheriff of the security of the bond after the lapse of a month, or which can make him guilty of an escape if he thinks proper to rest satisfied with that security, and should forbear in consequence to commit the debtor to gaol.

If the securities in the bond should be held to be discharged at the end of a month, as well when no certificate of recognizance has been produced as when it has been, and if the debtor must in such cases be looked upon as no longer rightfully upon the limits, then the sheriff would seem to be placed in an inconvenient position, for till the month had actually expired he could not tell whether he would be at

liberty to commit the party to close custody or not, and when he did ascertain his position it might be no easy matter to find the party, who having had in the meantime the whole range of the county as the limits of the gaol, and knowing that he had procured no recognizance of bail since he gave the bond, would have ample opportunity of avoiding commitment by concealing himself or by leaving the country.

Taking this view of the statute, I cannot accede to what the defendants' counsel in this case contends for, that the liability of the bail ceased at the end of the month, and that the sheriff could not have sued upon the bond for a departure from the limits which took place after that time, and consequently could not assign the bond on account of any such breach.

I see no ground for a new trial, and indeed upon the argument the defendants' counsel did not press it upon the evidence, nor upon any other ground than the legal objection which I have been considering.

The other question is upon the damages which the plaintiffs were entitled to recover, and this comes up on that part of the rule which relates to the leave granted to move to reduce the verdict to nominal damages only, if the court should be of opinion that the plaintiffs are not absolutely entitled to recover the whole amount for which Salmoni was in execution, notwithstanding his (Salmoni's) being notoriously insolvent at the time of his arrest, and from thence till he died.

This is a question on which it has appeared to me there is much room for doubt.

In the case of *Callagher v. Strobridge* in this court, (Dra. Rep. 168,) it seems to have been assumed that the plaintiff, in an action on a bond for the limits given by a debtor in execution, should recover as of course the full amount of the debt, besides costs, &c., but there nothing seems to have been given in evidence upon the trial that could affect the claim to damages, and the general question was not discussed. In actions against the sheriff for the escape of debtors in execution, where the plaintiff

declared in debt, as he was allowed to do by the statutes 13 Edw. I., ch. 11, and 1 Rich. II., ch. 12, it has been always held to follow as a consequence that he should recover as of course the full amount for which the debtor that escaped had been liable upon the execution.

It seems to have been indeed rather a strained construction of the first mentioned statute, to hold that it had so general an application that it authorised debt to be brought for the escape of debtors in execution in ordinary cases, for the statute was manifestly intended to apply to a peculiar class of cases only.

And with respect to the later statute of 1 Rich. II., from a careful examination of the language of the act throughout, it would appear to have been intended to give the action of debt in cases of voluntary escapes only. But under those statutes it has been always held, until the law was altered in England by 5 & 6 Vic., ch. 98, that the plaintiff in the execution might bring debt against the sheriff for an escape, either voluntary or negligent, and that when he did sue in debt he must recover the whole debt if he recovered any thing. *Bonafous v. Walker*, (2 T. R. 126,) *Hawkins v. Plomer*, (2 W. Bl. 1048.) In England, at the present day, by the statute which I have just mentioned, the plaintiff in any such case is now prevented from suing in debt, and is confined to the old common law remedy by an action on the case, in which he could only at any time have recovered, and can only now recover, whatever damages a jury may think he has suffered from the wrong. This is fully explained by the court in *Arden v. Goodacre*, (11 C. B. 371.)

We have had no such alteration made in our law in this respect as has been made in England by the statute 5 & 6 Vic., ch. 98, and therefore the sheriff may in this country be sued in debt for the escape of a debtor in execution; and if he is so sued, the plaintiff must recover the whole debt, without regard to the solvency of the debtor. That, however, we see is a consequence of the two ancient statutes I have referred to, enabling the plaintiff to sue in debt, which at common law he could not have done.

We must now come closer to the question before us, and

consider on what ground the plaintiff stands in suing in an action like the present upon a bond for the limits.

If the sheriff were in any such case suing upon the bond himself, not having assigned it, I think he should in reason, independently of any legislative provisions in our statutes, be allowed to recover the whole debt, because he would be liable to the plaintiff, who may sue him in debt for the escape, and recover the whole amount; and indeed, if he should be sued in case, it would be always in the power of the jury to give a verdict against him for the amount of the debt, and he would not therefore be certainly indemnified by recovering from the debtor or his securities any thing less. But the sheriff suing upon the bond would not, except from these considerations, be entitled as of course, I think, at common law, or under any English statute, to recover the whole amount of the debt upon the principle recognised in *Bona-fous v. Walker*, (2 T. R. 126,) and many other cases, namely, that he was suing in debt, and must therefore, from the form of action, and upon the plain intent of the statute 13 Edw. I., recover either the whole debt or nothing. This would not be his position, for though his action upon the bond would be in debt, it is true, yet it would not be debt for an escape, but debt which he was entitled to bring by reason of a forfeiture of a condition of a bond which was of such a nature that it was necessary to assign breaches of the condition under the statute 8 & 9 Wm. III., ch. 11. This is clear, I think, and in *Campbell v. Lemon* in this court (1 O. S. 401) it was so decided. That was an action upon a bond for the limits brought by the sheriff, or rather by his executor, and is therefore in point, supposing, as I am now supposing, that it was the sheriff who was suing upon the bond.

It is true that in actions upon bail bonds it has not been held necessary to assign breaches under the statute of Wm. III., but that is for a reason peculiar to the case of bail bonds and replevin bonds, as explained in *Middleton v. Bryan*, (3 M. & S. 155,) and which does not apply to bonds like the present. In actions upon such bonds, I have no doubt that it is necessary to assign or suggest breaches under the statute, and such has been always the practice; and though

in the case of the sheriff suing it would be proper, I think, that the jury who are to assess damages upon the breaches should be told to give the full amount which the debtor was liable for upon the writ, yet that would be for the reasons which I have already mentioned, and not because it was an action of debt, in which less damages than the debt demanded could not be given, for it would be an action in which, under the statute of William III., it must be left to the jury to assess the damages, in order that the plaintiff might be confined to the damage which he had actually suffered or could be made to suffer. Neither could the sheriff be held entitled to recover the whole debt under the statutes of 1 Rich. II., and 13 Edw. I., because those statutes relate to actions against the sheriff, and not actions by him, and have no application to such a question.

In this case, however, it is the plaintiffs in the *Ca. Sa.* who are suing as assignees of the sheriff. The question whether they can be held absolutely entitled to a verdict for the whole debt seems never to have attracted particular attention hitherto, and I confess I do not see on what ground such right can be maintained. The bond contains other conditions besides that respecting departure from the limits, in regard to some of which—for instance, the defendant not obeying an order of a judge to attend and be examined in regard to his property—it would be most unreasonable that a failure to it should necessarily subject the securities in the bond to the payment of the judgment debt. It is quite clear, I think, that such a consequence would not inevitably follow, but it must be left to a jury to assess the damages, and so it must, I conceive, in all cases to which the statute of William applies.

In the case of the sheriff suing, it may be proper, and I think it would be, for the reasons I have mentioned, to instruct the jury to assess the damages at the whole amount of the debt, with the charges upon the execution, &c., but those reasons do not apply in the case of the plaintiff in the *ca. sa.* suing as assignee of the bond, for there is no reason why he should recover more than the loss he has actually sustained. No statute gives him a right to more; the form

of pleadings in the action does not require it, but the contrary; and as he is the principal, and is not liable over to any third party, and is not suing the sheriff for escape, there is no just reason why he should receive from the jury higher damages for a breach of the condition of the bond than he would receive from them in an action on the case. All that is said by the court in *Arden v. Goodacre*, (11 C. B. 371,) seems to me to be in reason applicable to the plaintiff claiming before a jury damages upon the breach in an action upon such a bond.

My opinion therefore is, that if the plaintiffs really lost nothing by the departure of the debtor from the limits, because he had no means of paying the debt from the time he was arrested till he died, the plaintiffs had no claim to substantial damages; and according to the terms of the rule, and the understanding at the trial, I think the verdict should be reduced to a verdict for nominal damages, and that the rule should, as to the other terms of it, be discharged.

It must of course be understood that my opinion has been formed upon the law in force at the time the bond sued upon was made, and without reference to any enactments which have been since made, altering that law in regard only to debtors who should be taken in execution after the passing of such statutes.

It may appear to be an objection to the conclusion I have come to, that if the sheriff should be held entitled to recover in an action on the limits bond the full amount of the debt for which the defendant in the execution was upon the limits, the plaintiff will sue in the sheriff's name, instead of taking an assignment, and will thus be enabled to recover the full debt without reference to the question whether he has in fact suffered any loss from the breach of the limits bond. This is assuming that in assessing damages the jury could not or would not give any effect to the circumstance, which could be shewn at the trial, that the plaintiff in the execution, and not the sheriff, was the real party to the suit; but laying this consideration aside, and if upon any action brought in the sheriff's name on the bond the full amount of debt and costs must be recovered, that would not warrant us in deter

mining that for that reason merely, and to avoid such an apparent repugnancy, we must as a consequence allow the execution plaintiff also, when he sues on the bond, to recover the full amount, without regard to the fact that he may have lost little or nothing by the debtor's departure. What he should be held entitled to recover as a matter of strict right, and without reference to circumstances, must depend on the principles which must regulate actions on bonds, where there is no legislative provision affecting the question, and it is in that way I think we must dispose of this case. If there is or would be inconvenience from there being a difference in the rights of the sheriff and of the execution creditor suing on such bonds, the legislature can easily remove any such objection by providing that the bond shall in all cases be taken to the plaintiff, or by making other provisions on the subject.

McLEAN, J.—It has been contended that to entitle Salmoni to remain on the limits after the expiration of thirty days from the date of the bond, it was necessary that he should have entered into a recognizance of bail or bail-piece, with two sufficient sureties, as prescribed by the 5th section of 10 & 11 Vic., ch. 15, and that, as no such recognizance was entered into, the bond ceased to have any obligation to compel Salmoni to remain on the limits after the expiration of one month from the date of the bond, and that there was no remedy on the bond for any departure from the limits after that time. The bond sued on in this case, taken under the 7th section of 16 Vic., ch. 175, was not intended to be the only security for Salmoni remaining on the limits; it was to serve its purpose as a security for a period of one month from its date; but it was necessary before the expiration of that period to enter into the recognizance prescribed by the 5th section of 10 & 11 Vic., ch. 15, and to file the same in the office of the deputy clerk of the Crown for the county of Essex, and to give notice of such recognizance and of the sureties therein to the plaintiff, in the same manner as in case of bail to the action, in order to be entitled to remain on the limits for the time after the expiration of a month.

The only object which the legislature seem to have contemplated by authorising the giving of the bond, appears to have been to allow any party arrested sufficient time to enable him to enter into and give notice of the recognizance on which he was subsequently to enjoy the benefit of the limits. At the expiration of one month, if that were not done, the sheriff was authorised to commit a defendant to close custody, there to remain as if no such bond had been given. But the legislature, in order to provide against the omissions of parties to enter into recognizance, have provided a remedy upon the bond, and have declared, in the ninth section, that if any breach shall occur of the condition of the bond, by departure from the limits *or otherwise*, it shall be lawful for the sheriff by whom the party was arrested to sue for and recover from such party and his sureties, or either of them, *upon such bond*, such sum or sums of money as such party may have been arrested for, together with all such costs and damages as the sheriff may have sustained or be liable for by reason of such departure from the limits *or other breach* of the said bond.

The 10th section provides, that upon a party arrested committing a breach of the condition of the bond the sheriff shall be bound, *upon request*, to assign over the bond to the party at whose instance the arrest took place, and it declares that the sheriff shall thereupon be discharged from any claim by such arresting party on him for or on account of the party so arrested. Then the 11th section enables a party, upon the bond being assigned, to sue thereon as assignee of the sheriff, in his own name, and that it shall not be in the power of the sheriff to release the bond or any action brought thereon.

The condition of the bond is not merely that the party arrested shall not depart the gaol limits of the county or united counties, but that he shall forthwith surrender himself to the custody of the sheriff for re-committal to close custody, upon a rule of court or judge's order for that purpose being made, and shall in other respects well and truly observe and obey all rules of court and judge's orders in relation to such party. That is in substance much the same as the condition

of the recognizance prescribed under the 10 & 11 Vic., ch. 15. Had such recognizance been entered into in this case, and duly filed, and due notice given, and the party arrested admitted to the limits, the sheriff would have been discharged from all responsibility in the suit; but no such recognizance having been entered into, the plaintiffs were entitled to look to the sheriff, and to sue him as for an escape at the expiration of a month from the date of the bond, in which case they would have been entitled to recover the full amount of their debt and costs, because the sheriff, being bound to have the body of Salmoni in his custody to answer for the debt, could not shew, as he might on mesne process, that the debtor was insolvent and that no damages had been sustained. The statute 5 & 6 Vic., ch. 68, in England, has changed the law in that respect, and now a plaintiff can only recover the amount of damage which he may be enabled to prove to the satisfaction of a jury.

The plaintiffs having taken an assignment of the bond, sue in their own name, and assign certain breaches, that after it was made, and before it was assigned, Salmoni departed from the limits, by going into the county of Simcoe, and also by going into the state of Michigan, and on these breaches they claim to be entitled to a verdict for their whole demand against Salmoni, together with costs.

If the sheriff were the party suing, he could, under the 9th section of 16 Vic., ch. 175, recover the full amount, but the 11th section, though it authorises the plaintiffs to sue on the bond as assignees, in their own names, does not say that they shall be entitled to recover from the party and his sureties in the same manner as the sheriff might. The legislature could not have intended that if the breach of the condition of the bond had been in any other matter than a departure from the limits—for instance, disobedience of a judge's order to answer interrogatories—that the bail should become liable for the whole amount of a debt, whatever that amount might be. If the plaintiffs had taken the assignment in order to entitle them to sue for breach of such a condition, (and they could not have had any remedy against the sheriff in such a case,) they must have gone down to trial, and must prove

damages to entitle them to recover. The damages in such a case would necessarily depend upon the view a jury might take of the evidence. Such damages might clearly be recovered on the bond, while there was no cause of action for a departure from the limits. If then for any breach of the condition of the bond an action is brought, I apprehend that no distinction can be drawn, and that a jury must be at liberty to give, and can only properly give, such damages as is established by the testimony brought before them. In this case it was shewn that Salmoni had departed from the limits contrary to the condition of the bond sued on, and that established the plaintiffs' cause of action, but then the question arose, what damage the plaintiffs had sustained by reason of such breach. Did they lose their debt thereby? It was proved beyond a doubt that their debtor was in a state of hopeless insolvency at the time their writ was issued: that he had not means of satisfying a large number of prior executions, and that he continued so up to the time of his death, and in fact that he died upon the limits long before this action was brought. Under these circumstances it would be manifestly unjust that the plaintiffs should recover against these defendants a demand which they never could have recovered against their debtor, and I think that they can only be entitled to nominal damages.

BURNS, J.—This case, upon the rule to set aside the verdict, has been argued by Mr. Prince upon the assumption that the effect of the decision of the case of *Calcutt v. Ruttan*, (13 U. C. 220,) was that after the expiration of the month from the giving of the bond to the sheriff, the defendant in the meantime not having procured a certificate of a recognizance of bail being perfected, the bond thenceforth became void, and there could be no forfeiture of the condition of it after the expiration of that month. This assumption is based upon the proposition that the effect of that decision is that at the expiration of the month the duty of the sheriff was that he should re-take the debtor, and if he did not do so that the bail to the sheriff would be exonerated.

The decision in that case has been very much misunder-

stood, and very much misapplied. All that was decided in it was that by virtue of the eighth section of 16 Vic., ch. 175, if the defendant who gave such a bond as he might give under the seventh section did not perfect the recognizance within the month, and the sheriff did not re-take the defendant after the expiration of that time, he rendered himself liable to an action at the suit of the plaintiff in the judgment. The decision goes no farther than that.

The bond in the present case comes under the same act, having been executed before the passing of the Common Law Procedure Act, and it seems no recognizance of bail was ever put in, nor any certificate applied for. No evidence of any breach of the condition was given as taking place during the month next after the execution, but, on the contrary, the proof was that the debtor, long after the expiration of the month, on several occasions left the limits. The bond has been taken in accordance with the terms of the seventh section of the act, limiting no time for its duration, and not making any provision that it shall be void at the end of a month upon the defendant perfecting the recognizance. No doubt, if the defendant did perfect the recognizance within the month, according to the provisions of the eighth section, then the bond would become void, unless indeed there should have been perhaps a breach before the expiration of the month, and the sheriff would also be relieved from liability by production of the certificate of allowance. But this section says nothing about the operation of the bond being confined to the month, and there is nothing said in the case of *Calcutt v. Ruttan* from which it might be supposed the court thought the operation of the bond was confined to the month. If the plaintiff makes no complaint against the sheriff for not re-taking the defendant at the end of the month, and is willing to allow him to rest satisfied with the bond he has taken, I see nothing which would or should have have the effect of limiting its operation in duration of time. The ninth section gives the sheriff a right of action upon the bond whenever the condition may be broken, and the tenth section gives him authority to assign it when it is broken. I think it clear the 7th, 9th and 10th sections

do not in any way affect the operation of the bond as to its duration, and the eighth section only provides for the bond becoming void, and the sheriff being relieved from responsibility in the event of the defendant doing what it is provided he may do. These are not conditions stipulated for by the bond, but are conditions provided by the legislature, which, if performed within the month, relieve the sheriff of responsibility, and also those who in the meantime have been bail for the defendant.

With respect to the point urged by Mr. Prince, on the part of the defendants, that the plaintiff on a bond of this kind is only entitled to recover such damages in case of a breach of it as can be shewn to be the value of the custody of the person of the debtor, with a view to what can be obtained from him on account of the debt, I can only say that upon bonds taken before the Common Law Procedure Act, 1856, I have not hitherto considered the question, as open for discussion. I am aware that for a long series of years it was always considered by the profession that the assignee of the bond to the limits was entitled to recover whatever sum the sheriff might recover, and I am not aware that it was ever questioned that he could do so. The statute 10 & 11 Vic., ch. 15, introduced a variety of conditions into bonds for the limits about obeying notices, orders, rules, &c., which had not existed before, but I apprehend those provisions *per se* did not alter the effect given to those limits bonds. The question is an important one, and how it might be decided since the provisions of the Common Law Procedure Act have come into operation I will not say, but this case must be decided as the law stood before. The case of *Arden v. Goodacre*, (11 C. B. 371,) was decided upon the alteration of the law made by 5 & 6 Vic., ch. 98. Before that statute the action usually brought against a sheriff for an escape upon final process was debt, which the court considered the statute 1 Rich. II., ch. 12, gave, and in such action there could be no apportionment of the debt. *Hawkins et al. v. Plomer*, (2 W. Bl. 1048,) *Bonafous v. Walker*, (2 T. R. 126.) At common law there was no distinction between an escape upon *mesne* and final process; it was always an action on the

case which was brought against the sheriff, and in such action the measure of damages was the injury the plaintiff had sustained. The effect of the statute in England 5 & 6 Vic., ch. 98, is to restore the common law principle.

In this country, with regard to these bonds for the limits, the 11 Geo. IV., ch. 3, sec. 4, expressly gave the sheriff, when he had to sue for breach of the bond, a right to recover such sum or sums of money as the debtor was confined for upon the limits, together with all such costs and damages as he might have sustained by reason of such debtor withdrawing from the limits. The fifth section enacted that upon breach of the bond the sheriff might assign it, and the sheriff, upon so doing, should be discharged from any claim the plaintiff might have upon him. It appears to me the effect of the assignment was to transfer to the sheriff's assignee whatever rights the sheriff would have. If the sheriff had a right to recover the full amount of the sum for which the debtor was confined upon the limits, surely the assignee would have the same right. If he had not the same right the result must have been that in no case would a plaintiff take an assignment of a bond for the limits. Taking the case of a bail bond to the sheriff, which, under the statute 4 Anne, ch. 16, might be assigned, the assignee, if the bail defended and were allowed to defend the original action, was not limited to the amount sworn to, but might recover whatever he could prove his debt to be against the debtor, to the extent of the penalty of the bond, and they were liable for it; and, if they did not defend, then the assignee took his final judgment at once, without executing any writ of enquiry. In the latter case the assignee was entitled to claim from the bail the amount of the debt sworn to, and the affidavit of debt was held to be sufficient proof of the debt as against the bail. See *Moody v. Pneasant*, (2 B. & P. 446,) and *Middleton v. Bryan*, (3 M. & S. 155.) Now I do not see why there should be any different rule upon these limits bonds under the statute 11 Geo. IV., except that the amount to be recovered from the bail is limited, but it does not appear to me the assignee of such a bond can be said to stand in any worse position than

the sheriff, which of course he would do if he had not the same rights and if he were placed upon the footing of recovering upon the bond only so much as he could show was the value of the security of the body of the debtor. The debtor's body being once taken upon a *capias ad satisfaciendum*, it is satisfaction of the judgment, and no second *ca. sa.* could, I apprehend, issue, though the bond be forfeited. The plaintiff could not resort to any other remedy than upon the bond, unless the court permitted him to have execution against goods or lands, if the debtor happened to acquire such:—the 10 & 11 Vic., ch. 15, made no alteration in this respect. The ninth section of 16 Vic., ch. 175, under which statute the bond in question was taken, enacts that by departure from the limits the sheriff may sue for and recover upon the bond such sum or sums of money as such party may have been arrested for, together with all such costs and damages as the sheriff may have sustained or be liable for by reason of such departure from the limits. The tenth section provides for the bond on being broken being assigned, and discharging the sheriff.

The Common Law Procedure Act, 1856, repealed all these acts mentioned, but did not re-enact any clause or make any provisions similar to those I have mentioned, about what amount the sheriff might recover upon the bond, nor has the statute of 1857, for the amendment of the other act, said any thing about it. Indeed both of these statutes are silent upon the subject of the sheriff suing upon the bond at all, but both provide for the bond being assigned—the 305th section of the former, and the 25th section of the latter—but say nothing about what shall be recovered upon them. What may be the effect of this alteration of the law, that is, I mean the statute law, upon these bonds to the limits, I give no opinion. The present bond must, I think, be governed by the law as it stood when the bond was given, and according to that, and what has always been the custom and practice, the assignee I think is entitled to recover whatever the sheriff would be entitled to recover; that is, satisfaction to the extent of the judgment and costs, by reason of the body of the debtor being a satisfaction when

once taken in execution, and there being no remedy to have satisfaction a second time by taking the body of the debtor.

Rule absolute to reduce the verdict to nominal damages, *Burns, J.*, dissenting.

HENDRA V. MOFFATT.

Sale of land—Action for purchase money—Equitable plea claiming deduction for failure of title to part—Demurrer.

Declaration on defendant's covenant to pay £133 6s. 8d., and interest.

Plea, on equitable grounds, as to £96 6s. 8d., part thereof, that defendant purchased from plaintiff the west half of the south half of lot 7, in the 4th concession of London, which the plaintiff then had in his possession, and of which he had enclosed that portion on the north side of the Thames, which runs through said quarter lot, leaving $5\frac{9}{10}$ acres on the north side of the river: that, relying upon the fact that the conveyance which the plaintiff had lately taken to himself, was of the west half of the south half of the lot, whereby the plaintiff appeared to be the owner of said quarter lot; and relying also on the plaintiff's representation that a stone quarry on the river belonged to the plaintiff, from which defendant had from time to time procured stone before the purchase, and which formed an important portion of the value thereof; and relying chiefly on the fact that the plaintiff had enclosed that part of said quarter lot north of the river, and represented and claimed it as belonging to him—he, the defendant, purchased from the plaintiff said quarter lot, at the rate of £15 10s. per acre, or £775 for the whole, and gave a mortgage thereon for the balance of the purchase money, payable by instalments, of which he had paid all but the one sued for; that since paying the last instalment he discovered that the plaintiff did not at any time own that part of said quarter lot north of the river, and never had any right thereto; and defendant claimed a rateable deduction of the purchase money in respect thereof, amounting to £96 6s. 8d.

Held, on demurrer, plea bad, as shewing no equitable defence.

DECLARATION on a covenant by defendant to pay the plaintiff £133 6s. 8d., on the 22nd of December, 1859, with interest for a year.

Plea.—For defence on equitable grounds as to the sum of £96 6s. 8d., parcel of the moneys in the declaration mentioned, that on the 22nd of December, 1856, the defendant purchased from the plaintiff the west half of the south-half of lot number seven, in the fourth concession of the township of London, which the plaintiff then had in his possession, and among other portions of the said quarter lot enclosed, he, the plaintiff, had enclosed that portion thereof which is situated on the north branch of the river Thames, which branch of the said river runs through the said quarter

lot, leaving five acres and nine-tenths of an acre, more or less, on the north side thereof.

And the defendant further saith, that relying upon the fact that the conveyance which the plaintiff had lately taken to himself, was for the west half of the south half of the said lot, whereby he, the plaintiff, appeared to be the owner of the said quarter lot, and relying also upon the plaintiff's representation that the stone quarry on the river belonged to the plaintiff, and from which stone quarry the defendant had, before the purchase thereof, from time to time procured limestone, and which constituted an important portion of the value thereof, and relying chiefly upon the fact that the plaintiff had fenced in and enclosed that portion of the said quarter lot, which lies north of the said river Thames, and represented and claimed it as belonging to him, the plaintiff, he, the defendant, purchased from the plaintiff the said quarter lot, at the rate of £15 10s. per acre, or £775 for the whole quarter lot, and paid the plaintiff at the time of the said purchase the sum of £375, and took a conveyance from the plaintiff to himself, the defendant, his heirs and assigns, of the said quarter lot; and thereupon and immediately after the defendant executed to the plaintiff a mortgage, dated the same day as the conveyance, upon the said quarter lot, securing to the plaintiff the sum of £400, being the balance of the purchase money, payable in instalments of £133 6d. 8d. each, with interest, the first instalment on the 22nd of December, 1857, the second instalment on the 22nd of December, 1858, and the last instalment of £133 6s. 8d. and interest, on the 22nd of December, 1859.

And the defendant further saith, that he has paid the plaintiff all the money secured to be paid by the said Mortgage, excepting the said sum of £133 6s. 8d., and one year's interest thereon, mentioned in the declaration, being the last instalment of the said mortgage.

And the defendant further saith, that since he paid the instalment which was due on the said mortgage on the 22nd of December, 1858, he discovered that the plaintiff did not in fact at any time own that part of the said quarter lot

which lies north of the river Thames, and never in fact had any legal or equitable right or title thereto; and the defendant claims to be allowed a rateable deduction of the purchase money, in respect of the said piece of land to which the plaintiff had not any right or title, amounting to the sum of £96 6s. 8d.

Demurrer, on these grounds:—that the plea of the defendant does not disclose grounds which, if the plaintiff recovers a judgment at law in this cause, would entitle him to relief in equity against such judgment: that there are therein no direct allegations of wilful misrepresentation, deception, concealment, or withholding of information, or facts in connexion with the sale of the lands by the plaintiff to the defendant, as in the plea set forth, within the knowledge of the plaintiff, which would constitute fraud, either actual or constructive, on the part of the plaintiff: that from the allegations and statements in such plea contained, it may be implied that the defendant carelessly, without due enquiry, which it was open to him to have made at the time of such sale of lands to him as alleged, and with want of ordinary care and discretion on his part, drew a conclusion and formed an idea or impression as to the limit or boundary of such lands, as in his said plea set forth, by which he misled himself, without alleging or charging any attempt on the part of the plaintiff to misrepresent or conceal facts; and that, therefore, he would not be entitled to seek or obtain any relief on account or by reason of any thing in that plea set forth from the court of equity: that such plea purporting to disclose a good defence on equitable grounds, is generally bad and deficient in substance, in not directly imputing to the plaintiff fraud, deceit, misrepresentation, or concealment of any matter in connexion with the things therein set forth within the knowledge of the plaintiff, or upon which an issue or issues in fact which would form any defence in law or equity could be raised, but leaving some one or more of the grounds for equitable relief to be deduced from the statements and allegations therein contained.

Cameron, Q. C., for the demurrer, cited *Elder v. Beaumont*, 27 L. J. Q. B. 28.

J. Wilson, Q. C., contra, cited Sug. V. & P. 269; *Hill v. Buckley*, 17 Ves. 394; *Dobell v. Stevens*, 3 B. & C. 623; *Taylor v. Green*, 8 C. & P. 316.

ROBINSON, C. J.—The defendant does not in his equitable plea state positively that the quarter lot was sold to him at the rate of £15 10s. an acre, but avers that it was sold to him at that rate per acre, *or* £775 for the whole quarter lot, so that it may be that the plaintiff means that the quarter lot was sold to him for £775, *which according to his computation is* £15 10s. per acre. And again, he does not any where state that the quarter lot contained fifty acres, so that we have not such a statement in the plea as shews us that if the title is defective as regards the portion on the north side of the river, it would result as a *legal* consequence that just that amount which the defendant resists paying is the amount of the purchase money which might justly be withheld on account of the alleged disappointment. That alone would be fatal to the plea.

Then, besides, the plea does not allege that any representation was made by the plaintiff to him, the defendant, either that the quarry spoken of was in the quarter lot, or that he owned the land that was fenced in on the north side of the river.

If this plea could be held a sufficient equitable defence in a court of law against an action for the purchase money, then in every case of a sale and conveyance of lands, where the vendor's title has failed as to a part of the land to be conveyed, and he is suing for the price upon covenants or securities wholly independent, the vendee, instead of being left to his remedy upon the covenants for title, might set up an equitable claim to a proportionate abatement in the purchase money. I think such a course is not open to a defendant in cases of this kind, for we cannot hold in a court of law that the vendee is equitably entitled to withhold the exact sum which he chooses to withhold, and a court of equity, if it interfered under such circumstances as are alleged in this plea, would probably make their order in the alternative, that the vendor should either make a title to all that he assumed to sell, (which for

all we can tell the plaintiff might now be able to do, or might enable himself to do,) or else should submit to a certain abatement; and such an order would not be made without a judicial investigation which we have no means of conducting.

The plea does not by any means contain such statements as in a declaration would support an action for deceit in the sale.

In my opinion the plaintiff should have judgment on the demurrer.

McLEAN, J.—The plaintiff sues upon a covenant in a mortgage for £133 6s. 8d., and interest for a year at the rate of six per cent.

The defendant by an equitable plea claims an abatement to be made to him from that amount of £96 6s. 8d., being, as he alleges, a rateable deduction from the purchase money in respect of a piece of land situated on the north branch of the river Thames, containing five acres and nine-tenths of an acre, which piece of land he alleges he has discovered since his payment of the former instalment of the purchase money to the plaintiff, being part of the west half of the south half of lot number seven in the fourth concession of the township of London, *never did belong to the plaintiff*. He does not allege that the plaintiff at the time he sold to him the west half of the south half of the lot had represented to him that the piece of land referred to on the north of the river Thames in fact formed part of the premises sold, or that it belonged to him; but he says he made the purchase relying on certain things which he mentions, first, that the conveyance which the plaintiff had taken to himself was for the west half of the south half of the lot, whereby the plaintiff *appeared* to be the owner of that quarter lot. Secondly, that he relied on the plaintiff's representation that the *stone quarry on the river belonged to the plaintiff*, from which stone quarry he, the defendant, had *before the purchase thereof* from time to time procured limestone, which constituted an important portion of the value thereof; and, thirdly, relying *chiefly* upon the fact that the plaintiff had fenced in and enclosed that portion of the said quarter lot which lies north

of the river Thames, and represented and claimed it as belonging to him: relying, as he alleges, on these facts, defendant made the purchase of *the* quarter lot at the rate of £15 10s., per acre, or £775 for *the whole quarter lot*; and he alleges that he is entitled to a deduction of £96 6s. 8d., as a rateable deduction on account of *his* purchase of the land referred to on the north side of the river Thames. The defendant does not in any part of his plea shew or state what quantity of land the quarter lot was represented to contain or does contain, so that in truth, if the grounds on which he claims a deduction were otherwise sufficient, there is no mode apparent on the declaration by which it can be seen whether the deduction claimed is in fact a rateable deduction, or whether it is more or less; and he does not state that the quarry of limestone which the plaintiff represented to belong to him before the purchase thereof, and which formed an important portion of the value, was in fact on that part north of the river Thames, to which, as he alleges, the plaintiff at the time of the sale never had any legal or equitable right, or that it is on any portion of the quarter lot. The defendant, in fact, by his own shewing seems in making his purchase to have relied on his own observation, and to have deceived himself. He does not charge the plaintiff with any fraud or wilful misrepresentation or concealment of facts in connexion with the sale of the lands on which an issue could be tried, and the mere fact of the defendant being mistaken as to certain matters upon which he relied, without any deception being practised by the plaintiff, cannot form a sufficient ground for recovering back or claiming an abatement of any portion of the purchase money. In the case of *Early v. Garrett et al.*, (4 M. & R. 687,) which was an action to recover back purchase money on the ground of concealment of a defect in the title by the vendor, it was held that such purchase money could not be recovered back without proving that the concealment was fraudulent. If there has been no fraud or misrepresentation, or concealment of facts on the part of the plaintiff in this case, such as would entitle the defendant to recover back his purchase money, then he cannot withhold the payment of it in an action at law; and there

are no such grounds stated as appear to me to entitle the defendant to relief in a court of equity. On these grounds, therefore, I think judgment must be for the plaintiff on demurrer.

BURNS J., concurred.

Judgment for plaintiff on demurrer.

IN THE MATTER OF ARBITRATION BETWEEN THE CORPORATION OF THE COUNTY OF BRANT, AND THE CORPORATION OF THE COUNTY OF WATERLOO.

22 Vic., ch. 99, secs. 314-16—*Bridge between counties—Liability to rebuild, &c.—Arbitration.*

The road forming the division line between the counties of Brant and Waterloo, deviated from the allowance about five miles before reaching the Grand River, and ran wholly within the county of Brant till it intersected the river, where a bridge was built nearly a mile south of the line, and the road then continued on the other side of the river until it again struck the boundary. This road and bridge had been in use nearly thirty years—the actual division line never having been opened throughout.

The 22 Vic., ch. 99, sec. 314, (now repeated in Consol. Stats. U. C., ch. 54, secs. 327-9) enacted that in case a road or bridge lay wholly or partly between adjoining counties, the councils of the two municipalities, between which the road or bridge lay should have joint jurisdiction over the same, although the road or bridge might so deviate as in some places to be wholly or in part within one county: that no by-law of one municipality, with respect to such road or bridge, should have any force until a by-law had been passed in similar terms, as near as might be, by the other; and that in case either omitted to pass a similar by-law, the respective duties and liabilities of each municipality, in respect to the road or bridge, should be referred to arbitration, as provided by the act.

This bridge was destroyed in 1857, and the county of Brant passed a by-law providing that a new one should be erected, under the provisions of the act above referred to, to cost not more than £1400, of which they gave notice to the county of Waterloo, requesting them to pass a similar by-law. The county council of Waterloo thereupon appointed an arbitrator to act for them, giving notice at the same time that they disputed their liability to contribute. Two of the arbitrators afterwards made an award, determining that the proposed bridge was within the statute, and that the two counties were bound jointly to construct it.

On motion to set aside this award:

Held, that the bridge being wholly in the county of Brant, and off the division line, was not within the statute; but that as the arbitrators, therefore, had no jurisdiction, and the award was not made under the act, the court could not set it aside.

Quære, whether under the statute the arbitrators have power to award when, and at what cost, the bridge shall be built, and to compel the respective counties to contribute, or whether it is intended merely that the two municipalities are to concur in the regulations as to tolls or otherwise.

Semble, per Robinson, C. J., that the statute applies only where the deviation has been made to obtain a good line of road, not in order to suit the convenience of either county.

Cameron, Q. C., obtained a rule on the corporation of

Brant to shew cause why the award made by J. D. Clement and John Hislop, between these parties, should not be set aside, on the ground that the award was void, for that there was no liability by law on the county of Waterloo to repair jointly with the county of Brant the bridge which was the subject of the reference, as it was not a bridge within the joint jurisdiction of the two municipalities, nor within their joint liability to repair, and there was no power to submit the liability of the county of Waterloo to arbitration in the matter.

By 22 Vic., ch. 99., sec. 314, it was enacted that "in case a road or bridge lies wholly or partly between a county, town, or city, and an adjoining county, town, or city, the councils of the municipalities between which the road or bridge lies shall have joint jurisdiction over the same, although the road or bridge may so deviate as in some places to be wholly or in part within one county, town, or city."

And (sec. 315) "that no by-law of the council of any one of such municipalities, with respect to any such last mentioned road or bridge, shall have any force until a by-law has been passed in similar terms as nearly as may be by the other of the councils having joint jurisdiction in the premises." And (sec. 316) that "in case one of such councils omits to pass a by-law in similar terms to that passed by the other for six months after notice of the by-law, the duties and liabilities of each municipality in respect to the road or bridge shall be referred to arbitration under the provisions of this act."

The statute in the 336th clause made provisions respecting the proceedings in all cases of arbitration directed by it, of which the one most material to be considered is that contained in the 14th division of that clause, which was as follows, "Every award made under this act shall be in writing under the hands of all or two of the arbitrators, and shall be subject to the jurisdiction of any of the superior courts of law or equity, as if made on a submission by a bond containing an agreement for making the submission a rule or order of such court. And in the cases provided for by the last preceding sub-section, the court shall consider not only the legality of the award, but the merits as they appear from the proceed-

ings so filed as aforesaid," (which refers to provisions before made by the same section of the act), "and may call for additional evidence to be taken in any manner the court directs, and may, either without taking evidence or after taking such evidence, set aside the award, or remit the matters referred, or any of them, from time to time to the consideration and determination of the same arbitrators, or to any other person or persons whom the court may appoint, as prescribed in the 'Common Law Procedure Act,' and fix the time within which such further or new award shall be made, or the court may itself increase or diminish the amount awarded, or otherwise modify the award, as the justice of the case may seem to the court to require."

It appeared that the township line between Brant and Waterloo, which forms the division line between the counties of Brant and Waterloo, intersected the Grand River at a point which presented formidable obstacles to the erection of a bridge, on account of the height and abruptness of the bank on the west side of the river, and for two miles and more west of the river at that point the county line was in great part unfavourable for the formation of a road.

The inhabitants of that part of the county, in consequence, nearly thirty years ago, in laying out the roads deviated from the line in question about five miles west of its point of intersection with the Grand River, and partly perhaps with the view of obtaining a better line of road, and partly perhaps to accommodate the greater number of people settled in the vicinity at that time, they carried the line of the road to the southward and eastward of the town line, into territory which is wholly within the present county of Brant, till they came to the Grand River at a point nearly a mile south of the line which divided the counties of Waterloo and Brant. A bridge was erected there across the Grand River, and the road was continued from that bridge along the south side of the Grand River, in an easterly and northerly direction, till it again struck the division line between the present counties of Waterloo and Brant, at the point before spoken of, where the said line intersected the Grand River. The road as it was then laid out, and had been ever since

used, continued along on the east side of the Grand River, across the line which divides the counties.

This road, which had been so long in use, ran wholly within the county of Brant, from the point on the west, where it first deviated from the division line between the counties, till it struck the town line again at the intersection of that line with the Grand River, keeping generally as much as half a mile from the division line; and at the point where it first struck the Grand River, and where the bridge was built across the Grand River, it was distant nearly a mile from the county division line. The river, it appeared, at that point was free from any great natural obstacle to the construction of a bridge, and during the period which had elapsed since the bridge was built there a village had grown up, called Glen Morris, and the road, with this bridge upon it, which was made south of the county division line nearly thirty years ago, had been since the road constantly in use, the county division line subtending the whole line of deviation and running north of it, not having up to this time been opened or travelled, though the country on each side of it was thickly settled.

No attempt, it seemed, had been made in the meantime to erect a bridge over the Grand River at the point where the division line between Brant and Waterloo intersected it.

In 1857, the bridge at Glen Morris was carried away by a flood, and the county council of Brant desiring to replace it by a new bridge to be built over or near the site of the former, passed a by-law on the 22nd of June, 1859; and assuming the case to be one within the 314th section of the Municipal Act then in force, 22 Vic., ch. 99, they proceeded with a view to the provisions of that statute, desiring to obtain the co-operation of the county of Waterloo in erecting the bridge.

In the by-law the council recited the destruction of the old bridge, and that in order to connect, continue, and keep up the present county line of road or highway between the counties of Brant and Waterloo, on either side of the said Grand River, it was necessary that a new bridge should be constructed at the village of Glen Morris, at or near the site of the other one; that the said bridge, being a county bridge,

was required to be constructed at the joint expense, and by the joint action and concurrence of the councils of the said counties having joint jurisdiction in the premises. And the by-law enacted that as soon as the same could be accomplished under the authority of, and in the manner pointed out by, the 315th or 316th section of the statute, 22 Vic., ch. 99, a new bridge should be built over the Grand River at Glen Morris, at or near the site of the old one, to connect, continue, and keep up the present travelled county line of road or highway between the counties of Brant and Waterloo: that the cost of the bridge should not exceed £1400, and that it should be built under the joint direction, and at the joint expense of the said counties of Brant and Waterloo: that the clerk should transmit a copy of the by-law duly authenticated to the clerk of the county of Waterloo, requesting him to bring the same under the consideration of the municipal council of that county, in order that they might further the object in view by passing a by-law in similar terms as near as may be to that by-law; that in case the council of the county of Waterloo should not pass a by-law for this purpose within six months from notice of the by-law aforesaid, then that the warden of the county of Brant should appoint an arbitrator on behalf of that county, and give notice thereof to the warden of the county of Waterloo, in order that an arbitrator might be appointed on its behalf, and a third arbitrator also, as the law directs, to settle and determine upon the duties and liabilities of each of the said counties in respect of the construction of the said new bridge, as authorised by the Municipal Act.

Notice of the by-law and of the appointment of J. D. Clement, Esq., to be the arbitrator, and calling on the warden of the county of Waterloo to appoint an arbitrator, were accordingly served, whereupon the warden of that county, under the corporate seal, notified the warden of the county of Brant that the corporation of the county of Waterloo had, in pursuance of the notice and of the statute, appointed an arbitrator, James Cowan, Esq., on their behalf, in order that a third arbitrator might be appointed under the statute, whose duty it should be to settle and determine upon the

duties and liabilities of the said counties in respect of the construction of the said bridge contemplated by the said by-law; that their said arbitrator would, on a day named in this notice, attend in Glen Morris to confer with the other arbitrators as to the appointment of a third arbitrator, in accordance with the notice received and with the statute, &c., and to determine upon the time and place to arbitrate and award upon the aforesaid matters.

But in this same notice, the warden of the county of Waterloo stated that the municipal corporation of that county disputed the fact of their being liable to contribute towards the construction of the said bridge; "and they deny that it is such a bridge as the counties of Brant and Waterloo could exercise a joint jurisdiction over under the statute, and that they will resist the claim of the corporation of Brant on these grounds before the arbitrators."

The two arbitrators met, and by indenture of the 16th of February, 1860, appointed one John Hislop to act with them as third arbitrator, and being sworn they proceeded in the business of the reference, examining many witnesses, and inspecting the county division line, and the old highway which deviated from it, and also the bank of the Grand River at Glen Morris, at the point of intersection of the town-line, making also each of them a written statement of his own individual opinion upon the matters submitted to them.

On the 21st of March, 1860, the arbitrator for the county of Brant and the third arbitrator made their award, in which the arbitrator for the county of Waterloo did not concur, and he therefore did not execute it.

In this award, the by-law passed by the corporation of Brant was recited, and the notices and other proceedings which followed it, and it was particularly recited that the corporation of the county of Waterloo, in their notice given through their warden, disputed their liability to contribute towards the construction of the proposed new bridge.

And the two arbitrators awarded and determined "that the proposed bridge comes within and is subject to the provisions contained in section 314 of the statute 22 Vic., ch. 99, and that it is the duty and liability of the several municipal

corporations of the said counties of Brant and Waterloo jointly to construct the said proposed bridge; and further, that it is the duty of the said municipal corporations severally to take such lawful steps and proceedings as may be necessary to the immediate commencement and early completion of the said proposed bridge," &c.

M. C. Cameron showed caused, citing *Lafferty v. Stock*, 3 C. P. 1.

Cameron, Q. C., and *Eccles*, Q. C., contra.

ROBINSON, C. J., delivered the judgment of the court.

This case brings up a question of some importance to the community upon the proper construction to be given to the 314th section of the Municipal Act, 22 Vic. ch. 99, for in June, 1859, that was the statute which then governed.

The Consolidated Statutes of Upper Canada, ch. 54, have not, that we can see, made any change in the provisions upon the subject, but it is proper in examining the matter to look only at the statute in force at the time.

We do not think that the bridge in question comes under the 314th section of the act referred to, 22 Vic., ch. 99. The legislature has there spoken of *road or bridge* as two distinct things. They have not spoken of bridges which form part of a road lying wholly or in part between counties, but have applied their enactment to any road, *or bridge*, which lies wholly or in part between any one county and an adjoining county.

As therefore the road and bridge are in the act spoken of as distinct things, the disjunctive particle being used, it is the same, we think, as if each had been treated of in separate clauses. Now, supposing in this clause we were to read only what relates to bridges, leaving out the word "road" where it occurs, the provision would be this, "If a bridge lies *wholly*, or *partly between* a county, and an adjoining county," (which certainly cannot be said of this bridge,) "the councils of the municipalities between *which the bridge* lies shall have joint jurisdiction over the same, although the bridge may so deviate as in some places to be *wholly* or *in part* within one county."

The bridge which we are now referring to is wholly within the county of Brant, being nearly a mile on that side of the county line, and no part of it lies between two counties. It cannot be said of it, in the words of the statute, that it deviates from the county line "*so as to be in some places wholly or in part within one county,*" for it is not on the county line in any part, and so cannot *deviate from it*.

We think, therefore, the arbitrators had no jurisdiction to award any thing about it, and taking this to be so, we can hardly take it upon ourselves to set aside the award which they have made, for unless this is an award "made under the Act," we can have no jurisdiction over it under the 336th section. Indeed the award does not direct anything to be done, and so cannot in itself affect the county of Waterloo. The arbitrators have merely assumed to determine that the case is one coming under the statute, and nothing beyond that. But was that a point intended to be referred to their determination? We think not. They have only a discretion to determine what each county shall do in reference to a bridge which comes within the statute, as being "wholly or partly between a county and an adjoining county."

If it were within our province to look into the merits, and say whether this bridge ought in justice to be held to belong to *both counties*, though it is nearly a mile within the county of Brant, I should be inclined to say it should not, after reading, as I have, all the evidence upon the subject, for the road seems to have been carried into South Dumfries, (now part of the county of Brant,) for reasons of convenience to the people of South Dumfries, in part at least, whereas the provision was intended, I think, to refer only to cases of deviation required for obtaining a good line of road.

We give no opinion whether in cases clearly within the act it would be in the power of arbitrators under it to award when and at what cost a bridge should be built, and to compel the respective counties to contribute to it in equal proportions or otherwise, or whether the giving to the counties a joint jurisdiction over the bridge means any thing more than that they are to concur in any regulations necessary to be applied to it, in regard to tolls or otherwise.

Rule discharged.

THOMAS A. BEGLEY AND ELEANORA DUNDAS BEGLEY, HIS
WIFE, V. GIBSON.

*Dower—Land required for military purposes—Ordinance vesting act, 7
Vic., ch. 11.*

To an action of dower the tenant pleaded, that the husband in his life time, in the year 1823, granted certain land to the king: that from thence until the passing of 7 Vic., ch. 11, the Crown continued seised of said land for purposes connected with the military defence of the province, and the same was during all the time aforesaid duly set apart and occupied for the said purposes; that by the 7 Vic., ch. 11, the said land was vested in the principal officers of ordnance, for the service of said department, &c: that the lands in the declaration mentioned formed part of the said land, and were part of the land on which a great part of Bytown had been built, as mentioned in the fifth clause of that statute, and at the passing of the act was one of the building lots mentioned in said section, and was held under said officers by the tenant in this suit; and that under the powers contained in the sixth section the said officers in 1844 conveyed the land to the said tenant, to be held by him and his heirs for ever, clear of all charges and encumbrances of whatsoever kind or nature, as by the said statute they were empowered to do.

By the 7 Vic., ch. 11., sec. 1, the land in question was vested in the principal officers of ordnance, but it was provided that nothing in the act should be taken to affect any right, title or claim, vested in or possessed by any person at the passing of the act, nor to give them a better title than was then vested in the Crown; and the sixth section enacted that the said officers might convey this land, which had for some time been held by the tenant under them, "to be held as freehold for ever, and clear of all charges and incumbrances of whatsoever kind or nature." Held, on demurrer, that the plea shewed no defence, for the demandant's right was not extinguished by the conveyance to the Crown, nor by the provisions of the statute.

This was an action brought by Thomas A. Begley and Eleanora Dundas Begley, his wife, which said Eleanora Dundas Begley was formerly the wife of Hugh Fraser, deceased, to recover dower in lot number 15, on the north side of York street, in the city of Ottawa.

Plea.—That the said Thomas A. Begley and Eleanora Dundas Begley, his wife, ought not to have the dower of her, the said Eleanora Dundas Begley, of the lands, tenements, and premises aforesaid, with the appurtenances aforesaid, or any part thereof, of the endowment of the said Hugh Fraser, heretofore her husband, because he says that the said Hugh Fraser in his lifetime, to wit, on the 18th of June, 1823, did by deed grant, bargain sell, alien, transfer, convey, confirm, surrender, and yield up unto his late Majesty King George the Fourth, his heirs and successors, for ever, all those certain lots and parcels of lands, situate, lying and being in the township of Nepean, in the now county of Carleton, containing by admeasurement four hundred

and fifteen acres of land, &c., &c., (describing them by metes and bounds.)

And the said James Gibson further saith, that from the year of Lord, 1823, until the passing of the act of parliament next mentioned, his said late Majesty King George the Fourth, and his successors, his late Majesty King William the Fourth, and her Majesty the now Queen, respectively, while respectively Kings and Queen of the united kingdom of Great Britain and Ireland, were, and continued seised in their demense as of fee, in right of their Crown of Great Britain and Ireland, of the said lots and parcels of land so surrendered as aforesaid for purposes connected with the military defence of the late province of Upper Canada and Lower Canada, and of the Province of Canada, and the said lots of land during all the time aforesaid were duly set apart, used and occupied for the said purposes by her Majesty and her said predecessors, and during all the time aforesaid were by her Majesty and her said predecessors, duly placed under the charge and control of the officers of Ordnance of her Majesty and her said predecessors, for her Majesty and her said predecessors, for the purposes aforesaid; and that by an act of parliament of the province of Canada passed in the seventh year of the reign of her Majesty, chaptered eleven, and entitled "An act for vesting in the principal officers of her Majesty's Ordnance the estates and property therein described, for granting certain powers to the said officers, and for other purposes therein mentioned," the said lots of land so surrendered and hereinbefore described, and which are described in the schedule to the said act as follows, (giving the description, namely, 415 acres in the township of Nepean, purchased in 1823 by the Right Honourable the late Earl of Dalhousie, then Governor General, acting for his Majesty, from Hugh Fraser, and conveyed in trust for his Majesty, his heirs and successors,) were vested in the principal officers of her Majesty's Ordnance in Great Britain, and their successors in the said office, and the several estates and interests therein, subject to the provisions of the said act, and in trust for her Majesty, her heirs and successors, for the service of the said department, or for such other services as Her Majesty, her heirs or successors, or the said principal

officers, should from time to time direct; and the said James Gibson further saith, that the lands, tenements and premises in the declaration mentioned, form part of the said lands so conveyed and surrendered to his said late Majesty King George the Fourth, and mentioned as aforesaid in the said schedule, and by the said act vested in the principal officers of Her Majesty's ordnance, in trust for her Majesty, her heirs and successors, and that the said lands, tenements, and premises in said declaration mentioned, are part of the lands on which a great part of the town of Bytown had been built, as mentioned in the fifth section of the said statute, and at the time of the passing of the said statute were one of the building lots mentioned in said section as being held under the said principal officers, and were then so held under the said principal officers by the said James Gibson; and that under and pursuant to the powers and provisions contained in the sixth section of the said statute or act of parliament, and upon and after making of the payments mentioned in and provided by the said sixth section, the said principal officers, who from the time of the passing of the said statute up to the time of making the deed hereinafter mentioned were and continued seised in fee simple, under the said statute, of the said lands, tenements and premises in the declaration mentioned, did by a good and valid deed and title dated the 19th of December, 1844, convey the said lands, tenements, and premises in the declaration mentioned, with their appurtenances, and the fee simple thereof, to him, the said James Gibson, to be by him, the said James Gibson, his heirs and assigns, held in freehold for ever, and clear of all charges and incumbrances of whatsoever kind or nature, as by the said statute or act of parliament they were empowered to do; and the said James Gibson has ever since continued seised in fee simple of the said lands, tenements, and premises, under the said deed and title; and this the said James Gibson is ready to verify, and therefore he prays judgment, &c. &c.

Replication.—That the said Eleanora Dundas Begley ought not, by reason of any thing in the said third plea mentioned, to be barred of her dower in the said lands, because they say that the said Hugh Fraser, the former

husband of the said Eleanora Dundas, whilst he was seised of the said lands in his demense as of fee, and after his intermarriage with the said Eleanora Dundas, and after the said Eleanora Dundas had by her said marriage acquired an inchoate right to dower in the said lands, and whilst she, the said Eleanora Dundas, was the wife of the said Hugh Fraser, he, the said Hugh Fraser, made such conveyance of the said lands as in the said third plea is first mentioned, and that after the death of the said Hugh Fraser and after the said inchoate right to dower in the said lands of the said Eleanora Dundas had become perfect, the said principal officers made such conveyance of the said lands to the said James Gibson, as in said third plea is also mentioned, but that the said Eleanora Dundas did not join in or execute the said conveyances, or either of them, nor did she, the said Eleanora Dundas, in any other manner ever bar, release, or part with her dower in the said lands, or any part thereof.

Demurrer.—That the replication admits the truth of the allegations contained in the said plea, but shews no sufficient answer thereto: that the plea shews that the land, out of and in respect of which dower is claimed, was land held by her Majesty and her predecessors, in fee simple, from the year of Lord, 1823, down to the passing of the Ordnance Vesting Act, 7 Vic., ch. 11, for purposes connected with the military defence of the late Provinces of Upper Canada and Lower Canada, and of the Province of Canada, and that dower cannot be claimed or recovered out of land held for such purposes: that by the said statute the fee simple of the said land was vested in the principal officers of Ordnance, for purposes connected with the military defence of the province, and was free from all such claims as claims of dower: that the said plea shews that a conveyance was made to the said James Gibson by the said principal officers in fee simple, and free from all charges and incumbrances, under and pursuant to the sixth section of the said statute, and under the said section and the said statute the said James Gibson before and at the time of the commencement of this suit held, and still holds the said lands free and clear of all claims for dower.

The demandants joined in demurrer, and gave notice of the following exceptions to the plea:—that it does not appear in or by the said third plea that the said Eleanora Dundas Begley ever released her dower to the said the Right Honourable the Earl of Dalhousie, or to her Majesty, or to any of her predecessors: that at the time of the passing of the act in said third plea mentioned the said Eleanora Dundas Begley was therefore entitled to her dower in the said lands, under the proviso in the first section of the said act contained, and that, the said Eleanora Dundas Begley being so entitled, the said third plea does not shew or set forth any valid defence to the said action.

Richards, Q. C., for the demurrer, cited *Hoyt v. Widderfield*, 5 U. C. R. 180; *Thornhill v. Jones*, 12 U. C. R. 235; *Park on Dower*, 121; *Bac. Abr. "Dower," B. 2*; *Com. Dig. "Dower," A. 8*; *Bl. Com. II. 132*; *Co. Lit. 31 b*.

Adam Wilson, Q. C., contra.

The statutes referred to are noticed in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

This case appears to be one of very considerable importance as regards the interests it involves.

In the argument the tenant placed some reliance upon the dictum, which is repeated wherever the law of dower is comprehensively treated of, that a woman is not dowable of a castle or fortress maintained for the public defence. Lord Coke, in *Co. Lit. 31 b*, states the principle thus: "Of a castle that is maintained for the necessary defence of the realm a woman shall not be endowed, because it ought not to be divided, and the public shall be preferred before the private." There is no doubt ample authority in support of the principle as it is thus laid down, and the exception is one not only justified on the strongest grounds of public policy, but it may be said fairly to arise *ex necessitate*, for to allow the claim of the widow to enter into and possess a third part of a castle held for the public defence, would be altogether inconsistent and absurd. But we do not think the present case can, without straining the law unwarrantably, be brought within that principle. We see nothing upon

the pleadings of the existence of any castle or fortress anywhere upon the tract in question.

The demandant is claiming dower in a town lot in the city of Ottawa, which the Crown, or rather the principal officers of Ordnance, sold and conveyed to the tenant, Gibson, in fee simple, and which formed part of 415 acres, acquired by the Crown by purchase from the demandant's husband during the coverture.

The deed by which the Crown acquired the land is not set out, but the statement in the third plea is not denied, that after the purchase, the land (that is, the 415 acres) was held by the Crown for purposes *connected with the military defence of Canada*, and was set apart, used and occupied for such purposes, and placed under the control of the officers of Ordnance. Though the purchase was made by the Crown so early as in 1823, we see from the acts of parliament referred to, that it was made in consequence of an intention then entertained of constructing the Rideau Canal, for which provision was afterwards made by the public act passed in 1827, 8 Geo. IV., ch. 1.(a) That act recites that his Majesty had directed measures to be taken "under the superintendence of the proper military department, for constructing a canal for uniting the water of Lake Ontario with the river Ottawa, and thereby affording a convenient navigation for the transport of naval and military stores; and whereas such a canal, when completed, will tend most essentially to the security of the province, by *facilitating measures for its defence*, and will also greatly promote its agricultural and commercial interests."

This recital serves rather to shew that to facilitate military defence in a general sense was one of the inducements for undertaking the work, than that any or all of the lands required in consequence of the intention to construct the work, were intended to be held and occupied, or were afterwards necessarily held and occupied for the public defence, within what we conceive to be the meaning of the principle as laid down by Lord Coke. And indeed the language of the plea, which states only that the land had been occupied

(a) Printed in the local and private acts, revised statutes, page 197.

by her Majesty and her predecessors, "for purposes connected with the military defence of Upper Canada," though as definite and strong as it could have been used consistently with the truth of the case, does not in our opinion bring this case within the exception of which the defendant would avail himself.

It is to be considered, also, that we know judicially from the public statute 7 Vic., ch. 11, secs. 1, 5, 7, that the lands sold by the Ordnance, as those lots were, to private individuals, and now forming part of the city of Ottawa, were disposed of by the Crown as not being necessary to be held for military defence, which indeed is shewn by the fact of their having been so disposed of by the principal officers of her Majesty's Ordnance. And, moreover, this is no question between the demandant and the Crown, in which the effect of any such circumstance as the land out of which dower is claimed being actually occupied as a fortress or otherwise for the military defence of the province can come in question, for this land, being disposed of by the Crown, is now held by a private individual as his own exclusive property, wholly unconnected with the military defence of the country.

We have only to consider, then, whether the claim of the widow to dower in lands of which her husband was seised in fee during her coverture, has been barred, or is lost, by or in consequence of any thing that is stated in the plea, or of which we are bound to take judicial notice.

The mere fact of the husband having surrendered the estate to the Crown, would not, we assume, interfere with the claim to dower, for in the hands of the Crown it might be subject to dower, though the claim could not be enforced, as against an individual, by action, but must be promoted by such a proceeding as the prerogative requires to be adopted in such cases, that is, by petition, as appears in Menvil's case (13 Rep. 22,) where the widow was petitioning Queen Elizabeth for her dower in land which her husband had been seised of in fee, and had alienated to persons who conveyed to the Queen; and it was objected that the demandant, claiming an estate or interest against the Crown, ought to

have had an office found for her; but the court held that to be unnecessary, because the title to dower stood with the Queen's title, and affirmed it, though it would have been otherwise, they said, if the title in the demandant in the petition had disaffirmed the Queen's title. The court therefore entertained her claim upon petition without office, she claiming only for term of life, and affirming the title of the Queen.

If, then, we do not find in the mere fact of Hugh Fraser, the husband, having during the coverture conveyed the land to the King, or in the purpose for which the land is stated and appears to have been held by the Crown, any thing decisive against the widow's claim for dower, we have only to consider whether any thing has been done by the legislature which extinguished the claim, either upon the estate vesting in the Crown or afterwards, or which enabled the Crown to convey the land free from any such claim; for it cannot be questioned that it was in the power of the legislature to do either one or the other, but then the intention to bar the dower must be clear, and such intention must appear to have been so plainly carried out as not to leave reasonable ground for doubt.

It is the tenant's plea that we have to consider, rather than the replication in answer to it, which is demurred to, for it is quite clear that if the plea is in substance a bar, the replication can be no sufficient answer to it, for it takes no notice of the special matter pleaded, but merely asserts that the demandant's husband was seised during the coverture, and that she never barred her dower.

The tenant in his plea relies on the Ordnance Vesting Act, 7 Vic., ch. 11, and the question is, if the Crown by the deed made by Fraser in June, 1823, took the estate, subject to the widow's claim for dower, which for any thing that we see I think was the case, did the legislature by that statute extinguish the claim?

As there is no appearance of any compensation granted for the claim, or of the demandant having done or concurred in any thing that would bar it, it should appear clearly that the legislature have done what the tenant in his plea asserts

they have, for it certainly would not have been competent to the Crown, after it had taken the estate, to do any thing in derogation of the claim to dower which remained in the widow.

It seems strange that care was not taken to see that the claim for dower was barred when the purchase was made. As we must assume on this record that it was not barred by any deed of the grantor's wife, we should expect to see some provision made in the statute for compensating the demandant for the claim, if it were intended to extinguish it by the interposition of the legislature. The statute contains no such provision, but does it nevertheless abolish the right?

The claim to dower, it is clear, was present to the mind of the person who framed the statute, for in the 10th and 22nd sections there are provisions respecting dower, but these clauses do not reach the present case, of land that had been acquired by the Crown, and was held by it at the time of passing the act; nor is there any express mention of *dower* in any part of the statute which applies to lands so acquired and held.

Then is there in the act any general provision which by fair construction affects the claim of the demandant, although dower, *eo nomine*, may not be mentioned in such provision.

The first section of the statute seems to us clearly to include this tract of 415 acres bought from Mr. Fraser, and the saving at the end of that clause would, we think, extend to *any right of dower* existing at the passing of the act, though I have doubted whether the words can be held to embrace a mere inchoate or possible claim to dower contingent upon the death of the husband, and whether Fraser was dead or not when the act was passed, does not appear on this record. Such an inchoate or contingent claim could hardly be held to be a "title or claim *vested in or possessed by*" the wife, "to, in, or upon the land," so long as her husband was living; and yet, if the question depended only on that clause, as we would desire to give it a liberal construction, it would be proper to consider as coming in aid of a liberal construction the words which follow, "nor to give the said principal officers any greater or better title to any lands or

real property than is now vested in the Crown, or in some person or party in trust for the Crown."

Taking the whole together, we should be inclined to hold it to be the effect of the saving words in that clause, that the Crown holding the land subject to the wife's contingent claim to dower, the legislature did not by the act mean to vest, and did not vest the land in the Ordnance discharged of that contingent claim; for then in fact the officers of the Ordnance would have *a better title than the Crown*, in the reasonable sense of the words used, though in a strict legal sense the title of the Crown was good, but exposed to the contingency of an incumbrance upon it being created by the circumstance of the wife surviving her husband.

Our statutes relating to the barring of dower by married women shew plainly that the legislature has treated the inchoate right to dower as a *claim*, and even as a *right* while the husband is still living.

But then we have to consider the sixth clause of the Ordnance Vesting Act 7 Vic., ch. 11, on which the tenant mainly relied in the argument of this case, and has expressly relied in his plea.

It is averred in the plea that the lot of land out of which dower is claimed is one of those lots in the city of Ottawa referred to in the 5th and 6th sections of the act, and that is not denied. The defendant, on his side, contends that the sixth clause is decisive against the demandant's claim to dower, because it does in express terms enable the principal officers of the Ordnance to convey to any person who shall after the passing of that act become the purchaser of any land referred to in that clause, and shall have paid for it as the act requires, "*the fee simple of the land, to be held in freehold for ever, and clear of all charges or incumbrances of whatsoever kind or nature.*"

It is stated by the demandant, in her replication, that her husband died before the conveyance was made to the tenant, Gibson, and that the right of dower had therefore become perfect, and was an "*incumbrance*" before and at the time that he received his title. For all that appears in the pleadings, indeed, the husband may have been dead before the

act 7 Vic., ch. 11, was passed, in which case the demandant's right to dower would have been perfect before the land in question was transferred by her Majesty to the Ordnance.

However this was, it must have formed an incumbrance existing at the time the act was passed, and the tenant insists that the effect of the sixth clause must be to relieve the estate in his hands from that incumbrance, whatever equitable claim to compensation the demandant may be thought to have in consequence of that provision against any other person or party.

There is much apparent force in the tenant's claim to be treated as holding under that clause a good parliamentary title, free from all incumbrances, and the argument in his favour would have been stronger if the statute had contained no such saving as that which is to be found at the end of the first clause. The whole question seems to us to turn upon the effect of the first and sixth clauses taken together. If we give a literal interpretation to the sixth clause, unrestricted by the saving contained in the first, then undoubtedly the tenant, when he took his deed, must have acquired a good title against all the world, and one relieved from incumbrances of every kind.

But in our opinion it would be unreasonable to give that construction to the sixth clause. We must allow its effect to be controlled by the saving contained in the first clause, which saving is nothing more than natural justice would have dictated, in order to prevent the act of the legislature from having an injurious *ex post facto* operation.

We consider that nothing more is meant by the sixth clause, than that the title which the purchaser is to receive from the principal officers of the Ordnance shall be free from quit-rents, or rent-charges, or incumbrances of any kind, created or attempted to be created by the Government or by the Ordnance, since the land was acquired by the Crown; in other words, that the principal officers shall convey fully and freely, without reserve of any kind, all the interest which they took under the statute.

It could not have been intended by the sixth clause to abolish the protection justly provided by the first, by en-

abling the officers of the Ordnance to convey to purchasers from them a better title than the Crown ever held, and better than had been vested in them under the statute.

In our opinion judgment must be given in favour of the demandant.

Judgment for demandant on demurrer.

SCOTT ET AL. V. THE CORPORATION OF THE TOWN OF PETERBOROUGH.

Municipal corporations—Work and labour—Plea, that the debt was incurred in previous years without authority, and not provided for.

Declaration against the Corporation of the Town of Peterborough for 1860, for work and materials, and for goods and money supplied “to aid and assist in the construction of a certain bridge across the river Otonabee, connecting the boundary line between the townships of Otonabee and Douro, in said County of Peterborough with the boundary line between the township of Smith and the town of Peterborough.

Pleas 1.—That the cause of action arose for and concerning a debt incurred and falling due during 1859, which was not within the ordinary expenditure of the corporation for that year, and for which no estimate was made and no rate imposed.

2. That the debt was incurred in 1859, for assisting to build a bridge not within the municipality, which debt was not authorised by any by-law, nor any rate provided therefor.

3. That the bridge was not on the bounds of the said town of Peterborough. *Held*, on demurrer, that the first and second pleas shewed a good defence; and that the third plea was also good, for the declaration sufficiently shewed that the bridge was not *within* the town, though that was not negatived by the plea.

DECLARATION for money payable by the defendants to the plaintiffs for goods bargained and sold, for work and materials, money paid, and for goods and money supplied, furnished and given by the plaintiffs to divers persons at the request of the defendants, to aid and assist in the construction of a certain bridge across the river Otonabee, connecting the boundary line between the townships of Otonabee and Douro in the said county of Peterborough, with the boundary line between the township of Smith and the town of Peterborough; and for interest, for money had and received, and on account stated.

Second plea, that the plaintiffs' cause of action, if any, arose after the passing of the act 22 Vic., ch. 99, for and concerning a debt alleged to be incurred and falling due

during the municipal year, 1859, by the defendants, being a municipal corporation under the said act, and for which said alleged debt, which was not within the ordinary expenditure of the said corporation during the said year, no estimate was made by the said defendants, nor any by-law passed by them for the creation of such debt, nor for imposing any rate over and above, and in addition to all other rates whatsoever for the payment of the said debt.

Third plea, that the said alleged debt in the declaration mentioned was incurred after the passing of the act 22 Vic., ch. 99, to wit, in the municipal year, 1859, by the defendants, being a municipal corporation under the said act, in assisting to build and erect a bridge not within the said municipality of the said defendants, which said assistance, and said debt was not authorised by any by-law passed by the said defendants, being a municipal corporation as aforesaid, nor any rate nor means whatever for the payment thereof provided.

Fourth plea, to the fourth count, that the bridge in the said fourth count mentioned is not situated or erected on the bounds of the said town of Peterborough.

Demurrer to all these pleas—that the defendants admitting by their pleas that they employed the plaintiffs to do the work, perform the services, and expend the money in the declaration mentioned, and that they have received and are enjoying the benefits and advantages thereof, the matters set forth in the said pleas respectively constitute no good or legal bar to this action.

Eccles, Q. C., for the demurrer.

Read, Q. C., contra, cited *Mellish v. The Town Council of Brantford*, 2 C. P. 35.

The statutes referred to are cited in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The first two pleas appear to come within the decision made in the Court of Common Pleas in the case cited, of *Mellish v. The Town Council of Brantford*, (2 C. P. 35,) and though that judgment was given upon the effect of the

original Municipal Act, 12 Vic., ch. 81, as amended by the statute passed in the following year, yet it equally applies to the state of the law which existed in 1858, and exists at present.

The plaintiff in this case has endeavoured to maintain that, without reference to questions upon what municipal corporations ought to do, and what they may or may not legally do in regard to incurring debts and providing for their payment, it is sufficient to warrant a recovery against any such corporation that the debt upon which they were sued was incurred for a good consideration in money, or materials or labour which they have accepted and used; and that it is no defence which they can be allowed to urge that they have not themselves taken certain proceedings which the law required them to take, either in contracting such debts or providing for their payment. But we cannot, we think, rest upon any such principle. The legislature, in order to protect the interests of the rate-payers of the several municipalities against abuse of the powers intrusted to the municipal councils which represent them, and which have authority for many purposes to bind them, have provided certain restrictions upon their powers, which restrictions would be of little or no value for the purpose intended if persons dealing with corporations were not obliged for their own safety to enquire into and take notice of the extent of their powers, and what does or does not come within the proper scope of their authority. No doubt, when a person who has advanced his money or applied his labour at the request of a corporation, and is seeking to enforce payment, is met by defences of the kind which are set up in this action, if such defence succeeds a case of apparent hardship is created, and sometimes of great real hardship; but it is necessary to consider what is due to the community, on the other hand, and what ruinous waste and injustice might take place if certain checks were not imposed on the actions of municipal bodies. Some checks have of necessity been imposed, and when in any such case the governing body of a corporation has clearly exceeded its legal powers, courts of justice have no discretion to make their acts never-

theless binding upon those whom they represent in one case more than in another, nor in any such case.

The defendants in their second plea object to the attempt to make them liable in this action for a debt incurred not by themselves—that is, not by the council of 1860—but by the council of the previous year, 1859, because they say it was not a debt contracted for any thing within the ordinary expenditure of the corporation for that year, (1859,) when the debt was incurred, nor yet was there any estimate made in 1859 of the sum that would be required to meet it, nor any by-law passed to provide for its payment by imposing a special rate for that purpose in addition to all other rates; and it is alleged that the debt not only was incurred in 1859, but that it fell due within that year.

Upon the facts stated in their second plea the corporation have no power in 1860 to impose a rate for paying this debt. They have no authority and cannot be legally obliged to pay it out of the moneys raised for meeting the ordinary expenditure of their year; and the question then is, can a recovery be nevertheless had against them, to compel payment of a debt which they have no power to raise funds for.

The facts may have been such in truth as would shew the plaintiffs' claim to be one for which the corporation could in this year make provision by a rate, but, if they were, the plaintiffs should have shewn that in a replication to the plea. We have now to deal with facts admitted to be such as the plea states.

Mr. Harrison, in his very useful work, the Municipal Manual (page 108) has placed the question fairly in view, in his note to the 221st clause of the statute 22 Vic., ch. 99, and the same question is still open upon the law as it stands in the Consolidated Statutes, ch. 54, secs. 222-224. We see no means given to the council of 1860, by which they can raise money in the present year to pay a debt incurred and falling due in 1859, and not incurred for any thing falling within ordinary expenditure; and if the defendants have not means given to them by law of raising by rate the money necessary for satisfying this claim, and this not

merely because the rate would exceed their authority as regards amount, but because it is for a purpose for which the defendants have no authority to raise a rate: if this we say be the position of the defendants, then it appears they cannot be liable to have a judgment recovered against them.

If in a case like this, as stated in the second plea, or in any other case whatever, a judgment and execution should be obtained against a corporation, then it appears that the 220th section will enable the sheriff to collect the amount by striking a rate and causing it to be collected, if the amount be not paid to the sheriff by the corporation within a month after the amount of the execution has been notified to them. But we take it that that clause contemplates only the satisfaction of judgments for claims which the corporation can legally discharge, for otherwise the courts of law would have the power indirectly given to them of taxing the rate payers without their consent to pay debts which the corporation itself could not pay by a rate.

We think the second plea is a sufficient bar to the action, and that the third plea is also good, upon the authority of the case of *Mellish v. The Town Council of Brantford*, which applies more directly to this plea.

The 186th and 321st sections of 22 Vic., ch. 99, are to be considered in disposing of the fourth plea. By the first of these clauses the corporation are confined in their jurisdiction, as at any rate they would be, to the limits of the municipality which they represent. But by the latter clause the corporation of a town may grant aid towards making a bridge *on the bounds of such town*. The fourth plea asserts that the bridge mentioned in the fourth count of the declaration is not *on the bounds* of the town of Peterborough. Of course, not looking out of the plea, we could not say that that was any reason against the plaintiffs recovery if the bridge was within the bounds of the town. But the question is, whether the declaration does not negative that supposition. It appears to us to do so, and if so, then the plea is a good bar.

Judgment for defendants on demurrer.

FEEHAN v. THE BANK OF TORONTO.

Assignment—Filing—Execution—20 Vic., ch. 3, sec. 2.

Where an assignment is filed within the five days allowed by the 20 Vic., ch. 3, sec. 2, the filing relates back to the execution, and the assignee is entitled as against a *fi. fa.* placed in the sheriff's hands after the assignment has been executed, but before the registration.

APPEAL from the county court of York and Peel.

This was an interpleader issue, to try the right to certain goods seized under an execution at the suit of defendants, and claimed by the plaintiff under an assignment from the execution debtor.

The assignment was made on the 12th of September, 1859, but not filed with the clerk of the county court until the 15th, and the execution was placed in the sheriff's hands on the 14th.

The only question argued upon the appeal was, whether under these circumstances the assignment or the execution was entitled to prevail, the learned judge below having decided in favor of the execution creditor.

Eccles, Q. C., for the appellant. Helliwell, contra.

ROBINSON, C. J., delivered the judgment of the court.

We were told upon the argument of this case, that the respondent abandoned all other grounds of appeal, except the objection taken at the trial to the registration as being too late to be available in support of the assignment, being after the defendants' *fi. fa.* was delivered to the sheriff, though before five days had expired after the execution of the assignment. Upon that point, we think that so long as the mortgage is registered within the five days allowed by the statute 20 Vic., ch. 3, sec. 2, there can be no objection on the ground of non-registry, although the *fi. fa.* may have come to the sheriff in the meantime: that is, between the execution of the deed and its registration. The registration, we are of opinion, must be allowed to refer back to the 12th, as in the case of deeds of bargain and sale in England enrolled within the six months allowed for that purpose.

The assignment being a disposition in trust to sell, and

not by way of mortgage, must come under the second clause of the act 20 Vic., ch. 3, if under any, being looked upon as a sale; and the provision in that clause is, that every sale of goods, not being accompanied by an immediate delivery and followed by an actual and immediate change of possession, &c., must be in writing, &c., and shall be registered as thereafter provided (that is, filed with the county clerk) within five days from the execution thereof, otherwise such sale shall be absolutely void as against the creditors of the bargainor, and as against subsequent purchasers or mortgagees in good faith.

Now if this act had not been in force there was nothing to prevent the debtor, on the 12th of September, 1859, from making such an assignment for the benefit of his creditors, or from disposing of his goods or any portion of them directly and absolutely to his creditors in payment of his debts. The common law allowed it so long as no writ of execution had yet come to the sheriff's hands, provided the deed was made honestly and in good faith, and not collusively and fraudulently, upon any secret trust and understanding.

The statute, it is true, required it to be registered within five days, otherwise—that is, if it should not be registered *within that time*—it should be void against creditors. It was registered within four days, and how can it be held that the statute nevertheless made it void against the execution creditor because he came with his writ within two days of the execution of the deed, at a time before it was required that the deed should be registered.

A deed that would be good at common law cannot have been made void by the statute, unless it has been either made in violation of its provisions, or unless something which the statute required should be done in order to make it legal has not been completed with. Neither of these can be said to have been the case here.

We suppose the legislature felt that it would be harsh and unfair to allow an honest deed to be defeated because an execution happened to come in before it could by possibility have been registered, which might in many cases happen where the deed was executed at a distance from the county

town; and that to prevent litigation and discussion about what time it would be reasonable to allow, they fixed upon five days within which it must be filed. If done then, it is the same, we think, as if it had been registered immediately, because the law requires nothing more.

Appeal allowed. (a)

MCARTHUR V. COOL, NIXON, AND STAFFORD.

Division Court bailiff—Action on bond against his sureties—Right to sue jointly—Wrongful seizure—Interpleader issue.

Declaration against a bailiff of a division court and his sureties, on the covenant entered into by them in pursuance of the act, (Con. Stats. U. C., ch. 19, sec. 25,) alleging that the bailiff, having a writ of execution against one B., under pretence thereof wrongfully seized and sold the plaintiff's goods, and received the proceeds of such sale: that the plaintiff having claimed the goods, and having sued the bailiff in the county court for such seizure, the bailiff, for the purpose of trying the title to said goods and the proceeds thereof, issued an interpleader summons, on which the judge of the division court determined that the plaintiff owned the goods, and was entitled to the money received by defendant, with the costs; that thereupon it became the duty of the bailiff to pay the same to the plaintiff, yet he refused so to do, whereupon the plaintiff proceeded with his suit in the county court, and issued execution thereon, which was returned *nulla bona*; and so the plaintiff alleged that the bailiff had neglected to pay said money so received by him as such bailiff to the plaintiff, being the party entitled thereto, and had misconducted himself in his office to the plaintiff's damage.

Plea, by the sureties, that the said bailiff did pay to the plaintiff all the money he had received by virtue of his office, to which the plaintiff was entitled, and had not misconducted himself to the damage of the plaintiff in any suit or proceeding to which the plaintiff was a party.

Held, on demurrer to the declaration, 1. that the defendants could be properly sued on the covenant in a joint action; but

2. *McLean*, J., dissenting, that no cause of action upon the covenant was shewn: that the wrongful act of the bailiff in seizing by mistake the goods of a stranger was not misconduct or neglect of duty for which his sureties were liable; that the money received by him, though not received for the plaintiff at first, became the plaintiff's by virtue of the interpleader order, but (*McLean*, J., dissenting on this point only,) that the plaintiff had lost his right to sue for it upon the covenant by proceeding with the county court action and obtaining judgment there.

DECLARATION, that the defendants, on the 29th of November, 1858, by their covenant sealed with their respective seals, covenanted and promised in the sum of

(a) In *Feehan v. The Bank of Toronto*, 10 C. P. 32, also a case between these same parties and an appeal from the county court, the Court of Common Pleas have come to an opposite conclusion upon the effect of the statute, upholding the judgment below.

money following, the said defendant John Cool in the sum of £1000, the said defendant Adam Nixon in the sum of £500, and the said defendant Abel Stafford in the sum of £500, that the said defendant John Cool, as bailiff of the Division Court number ten of the united counties of York and Peel, should duly pay over to such person or persons entitled to the same all such moneys as he should receive by virtue of the said office of bailiff, and should and would well and faithfully do and perform the duties imposed upon him, the said John Cool, as such bailiff by law, and should not misconduct himself in the said office to the damage of any person being a party to any legal proceeding. And the plaintiff avers that after the making of the said covenant, the defendant, the said John Cool, being bailiff of the said Division Court, as such bailiff, on the 2nd of February, 1859, having in his hands as such bailiff a writ of execution issued from the said Division Court against the goods and chattels of one Donald Black, at the suit of one Robert H. Galbraith, did on the day and year last aforesaid, under pretence of the said writ of execution, wrongfully, unjustly, and unlawfully seize, take, and carry away certain goods and chattels of the plaintiff, to wit, two cows of the value of £20, as and for the goods and chattels of the said Donald Black, and did afterwards wrongfully sell the said two cows under the said execution, and as such bailiff did receive the proceeds of such sale, being £20; and the plaintiff, not being the party against whom the said process issued, having made a claim on the said defendant John Cool in respect of the said goods and chattels, and having commenced an action against him in the county court of the united counties of York and Peel, in respect of the wrongful taking and conversion of and sale of the said goods and chattels, the defendant John Cool as such bailiff did afterwards, for the purpose of trying the title to the said goods, and the right to the said proceeds thereof, issue an interpleader summons from the office of the clerk of the said tenth Division Court of the united counties of York and Peel, calling before the said Division Court as well the party who issued such process as the now plaintiff; and thereupon the county judge having

jurisdiction in such Division Court, did afterwards, to wit, on the 12th of September, 1859, adjudicate upon the said claim, and give judgment in favour of the now plaintiff, and that he, the now plaintiff, was the owner of the said goods, and entitled to the said money so received by the now defendant as the proceeds thereof as aforesaid, with the costs of the said proceedings, and did so order; and thereupon it became and was the duty of the said defendant John Cool as such bailiff, to pay over to the now plaintiff the said money and costs, yet the said John Cool, although requested so to do, and although a reasonable time for so doing had elapsed, wrongfully neglected and refused so to do. Whereupon the now plaintiff, in order to recover the value of his said goods and chattels, proceeded with the said suit in the said county court of the united counties of York and Peel in respect of the said wrongful taking, conversion and sale of the said goods and chattels, and such proceedings were thereupon had, that on the 18th of November, 1859, by the consideration and judgment of the said county court, he, the now plaintiff, recovered against the said defendant John Cool, as such bailiff, the sum of £25 17s., as well for the damages he had sustained by reason of the seizure and sale of the said goods and chattels as for his costs of the said suit, and did afterwards, to wit, on the 18th of November, for the purpose of enforcing the said judgment, issue upon the same out of the said county court, directed to the sheriff of the united counties of York and Peel, her Majesty's writ of execution called a *feri facias*, and endorsed with a direction to the sheriff to levy the sum of £16 5s., being the damages, and £9 12s., being the costs taxed, in the said cause, with interest on both sums from the date last aforesaid till paid, also the sum of £1 for the said writ, together with sheriff's fees, poundage, and incidental expenses; and the defendant John Cool still refusing to pay the said money and costs, or any part thereof, and the said sheriff being unable to make any part of the said money under the said writ, afterwards, to wit, on the 2nd of March, 1860, did return to the said writ of *feri facias* that the said defendant John Cool had not any goods and chattels in his county

whereof the sums of money or any part thereof could be made; and so the plaintiff saith that the said defendant John Cool did not pay over the money so received by him as such bailiff to the now plaintiff, being the person entitled thereto, or the costs so incurred in relation thereto as aforesaid, or either of them, or any part thereof, contrary to the said covenant, but hath hitherto neglected and refused so to do, and hath misconducted himself in the said office of bailiff to the damage of the plaintiff.

Plea, by the defendants Adam Nixon and Abel Stafford, that the said John Cool did pay over to the plaintiff all the money he had received by virtue of his office as bailiff to which the said plaintiff was entitled, and that he, the said John Cool, hath not misconducted himself to the damage of the plaintiff in any suit or pleading to which the plaintiff was a party.

The defendants Adam Nixon and Abel Stafford also demurred to the declaration, on these grounds:—that it is not shewn that the defendants covenanted with the plaintiff in the sums mentioned, or in any way whatsoever: that it is not shewn with whom the defendants covenanted, nor is it shewn under what statute, nor under what circumstances the said covenant made by the defendants could become a covenant with the plaintiff, nor how the plaintiff would become entitled to take advantage thereof: that it is not shewn that the said defendants are in any way liable on the said covenant to the plaintiff: that the said Cool is not shewn to have received any money to which the plaintiff is entitled: that it is alleged that the said Cool wrongfully and unlawfully seized the said goods in the declaration mentioned, and wrongfully sold them, by which it is denied that he seized or sold them by virtue of his office; and that the decision in the interpleader suit was that he had not received any portion of the said goods or moneys by virtue of his office, and that he could not by virtue of his office retain any portion thereof, and he was called upon to pay said moneys, and a suit brought against him as a wrongdoer, in which suit he could not justify by virtue of his office; and it is not alleged or shewn that any misconduct of the

said Cool, as such bailiff, affected or damnified the plaintiff as a party to any legal proceeding, or that he misconducted himself as a bailiff in any suit or proceeding to which the plaintiff was a party, and that such misconduct and wrongful acts were the only misconduct and wrongful acts against which the defendants covenanted: that they did not covenant against the wrongful acts of the defendant Cool generally: that the defendants are not shewn to have had notice of any of the facts alleged in the declaration: that the said declaration does not shew a joint covenant by the different defendants, but three several covenants: that one covenant is for £1000, and the other two for £500 each, not a joint agreement to pay £500, but two separate sums of £500 each, and that consequently they are sued for three separate sums, and not for a definite sum either of £500 or £1000, for which they would be all held liable: that the sum, whether £500 or £1000, for which one is alleged to have covenanted, is a different sum from the £500 or the £1000 for which either of the others covenanted, and therefore they cannot be sued upon any of them as on their joint covenant.

The plaintiff joined in demurrer to the declaration, and also demurred to the plea, on the grounds,—

1. That the said plea neither denies any of the facts specifically alleged in the declaration, nor avoids them.

2. That it does not appear whether the defendants by their plea intend to allege that the said John Cool paid over to the plaintiff the proceeds of the sale of the plaintiff's goods and chattels, seized and sold under the execution in the Division Court suit of Robert H. Galbraith v. Donald Black, in the declaration mentioned, or whether, by alleging generally that the said John Cool paid to the plaintiff all money received by him to which the plaintiff was entitled, the defendants wish to contend that the money received for the proceeds of such sale was not money to which the plaintiff was entitled.

3. Nor that the said John Cool paid over the said money immediately on the determination of the interpleader issue in the declaration mentioned, as he should have done, nor

that he paid the costs ordered by the judge, nor does it appear when the said money was paid; and it is no answer to the declaration to say that the defendant Cool paid over the money received by him after the further consequential damages and costs had been incurred by the plaintiff, by reason of said Cool's neglect to pay over upon the decision of the interpleader cause, as he should have done; and it is not stated that the plaintiff received the money in satisfaction and discharge of his cause of action.

4. That the plea, if intended to refer to the facts stated in the declaration at all, is neither a plea of payment on the day, nor of accord and satisfaction.

5. That the plea admits that in consequence of defendant Cool's neglect to pay when he ought to have done so, the plaintiff proceeded in his county court suit, and recovered judgment for his damages and costs, and in order to answer the plaintiff's action the defendants should have alleged payment of the amount of the county court judgment, as also of the costs ordered by the judge of the Division Court.

6. That it does sufficiently appear, from the facts stated in the declaration and admitted by the plea, that the said John Cool misconducted himself in his office to the damage of the plaintiff, a party to a suit or proceeding, were that fact necessary to sustain the plaintiff's action.

R. A. Harrison, for the plaintiff. *McMichael*, for defendants.

ROBINSON, C. J.—This case brings up several questions that I think are not free from difficulty.

The declaration is demurred to on several grounds, and among them it is taken as an objection that the three defendants could not legally be sued as they are, in a joint action as upon a joint undertaking, when they are bound in different sums; that is, the principal, Cool, in £1000, and the two sureties severally in £500 each.

The covenant sued upon is in the form prescribed by the Division Court Statute, Consol. Stat. U. C., ch. 19, sched.

A., which follows closely, though not exactly, the form of covenant to be entered into by sheriffs and their securities, under the statute ch. 38, Consol. Stats. U. C. It is true that the covenant does limit the amount that each of the covenantors can be respectively compelled to pay in all under the deed, but nevertheless in the form given by the legislature the parties are made to enter into a *joint* and several covenant, and this covenant is in fact joint. We cannot hold that to be illegal which the legislature has sanctioned, and which is not contrary to natural justice, and is capable of being easily carried into effect. The proviso at the end of the deed, that no greater sum shall be recovered under the covenant against the several parties than the deed specifies, is not a part of the undertaking of the covenantors, but it makes it the duty of the court to see that none of the parties to the deed shall be compelled to pay under it more in all than the sum which has been set opposite to his name.

No difficulty has been found in affording that protection to sheriff's securities, who have been usually sued in a joint action, but it must be admitted that in the Sheriff's Securities Act more care has been exerted than in this to suit the enactment to the peculiarities of the case.

The form of covenant given by ch. 19, of the Consol. Stats., is precisely that which had been given in the Division Court Act, 13 & 14 Vic., ch. 53, which was not intended, I think, to be superseded or interfered with as regards this point by the subsequent act, 16 Vic., ch. 177, sec. 12.

Then, with regard to the declaration in other respects, I understand from the statements in the declaration that Cool, the bailiff, sold the goods seized by him before the interpleader order was made, and not in pursuance of a direction contained in the order; and if that was so, then the money in his hands was not money received by him as bailiff for the owner of the goods, who could not be compelled to limit his claim to the amount of money made by the sale of his goods, but could insist on being paid their actual value. For the wrongful seizure, or wrongful sale, of the plaintiff's goods by the bailiff to satisfy an execution against Black, no action would lie under the covenant, for we must give the

same meaning to the language of the covenant for the purpose of maintaining the action against the sureties as we should for the purpose of supporting the action against the bailiff himself; and in my opinion the sureties were not intended to be made liable on account of the bailiff having seized the goods of a stranger to satisfy the debt due by an execution debtor, for that would not be money received for the person whose goods were sold, nor an act of misconduct or failure in duty such as the covenant is intended to secure against. This has been determined in regard to securities given by sheriffs upon principles which apply equally to the security sued upon. It is generally by mistake that such acts are done. The officer is often placed in a difficult situation, and obliged to act at his peril in determining upon conflicting claims. How it might be if in any case he acted corruptly or wilfully, in disregard of what he knew to be the truth of the case, need not be considered, for nothing of the kind is alleged here. The plaintiff indeed does not found his claim to sue upon the covenant on the alleged wrongful seizure and sale of his goods, but on the non-payment of the money to the plaintiff pursuant to the judge's order.

If that gives to the plaintiff a right of action upon the covenant, then undoubtedly the plaintiff is in a position to bring such action, though the covenant does not name him. The 27th section of the statute would expressly give the right.

Then does that which is stated to have occurred after the interpleader order issued give a good right of action under the covenant? That is the substantial question in the cause.

It is stated that the judge of the Division Court, upon the interpleader order, made, as I suppose, under the statute 16 Vic., ch. 177, sec. 7, adjudged that the plaintiff was the owner of the goods sold under the execution, and was entitled to the money which Cool, the bailiff, had received upon the sale of them, and also entitled to receive the costs of the proceeding by interpleader; *and that the judge did so order*; and that it thereupon became the duty of Cool, as such bailiff, to pay such moneys and costs to the plaintiff, which Cool, though requested, wrongfully neglected and refused to do.

Let us now ask ourselves whether such refusal or neglect to pay to this plaintiff the proceeds of his goods, wrongfully sold by Cool as bailiff under an execution against one Black, would of itself, if the proceedings had stopped here, have given a good right of action upon the covenant on which this action is founded. It would not have been money received by Cool as bailiff *for the plaintiff*, but would have been money received by him by virtue of his office of bailiff, which he had not duly paid over to the person entitled to the same, and so within the words and intention of the covenant.

If it appeared in the pleadings that Cool had not paid over the money to the plaintiff in the division court suit, or to the clerk, and held it still in hand, then the order made in this plaintiff's favour by the judge, together with the plaintiff's request to be paid the money, would have made this a case within the covenant, as money which Cool had received by virtue of his office as bailiff, and had not duly paid over to the person entitled, for the money being adjudged to have been made by Cool from the proceeds of the plaintiff's goods sold by him as bailiff, the plaintiff as owner of the goods could claim the money if he chose to limit his claim to that, for it could not in that case be claimed by Cool as his own private money, and certainly no one else had a claim to it.

But the plaintiff, not receiving the money from Cool, proceeded in his action of trespass in the county court, which had been commenced before the interpleader, and was stayed by the order, and he recovered judgment in that action against Cool for such damages as the jury thought proper to give.

That proceeding on his part, I think, was a relinquishment of his claim upon the money that had been received as the proceeds of the sale. The injury he has received by the alleged wrong has passed into *rem judicatam*, and the only question now is whether the defendants in this action can be made liable under the covenant to satisfy that judgment. I think they cannot, for that judgment is not for *money received* by Cool as bailiff, but for an alleged trespass in seiz-

ing and converting the plaintiff's goods. I do not think that Cool's seizing and selling the plaintiff's goods upon an execution against Black, which might have been innocently done upon a reasonable assurance and conviction that the goods did belong to Black, was a breach of that condition in the covenant, that the bailiff "shall well and faithfully do and perform the duties imposed upon him as such bailiff by law," for that is intended to secure parties against losses by the bailiff's negligence and omission, and it certainly was not misconduct in his office to the damage of this plaintiff as a party in any legal proceeding, for when the plaintiff's goods were seized and sold the plaintiff was *not a party to any legal proceeding* who could be injured by that misconduct, if an act of that kind could come within the meaning of the term *misconduct* as there used, which I do not think it would.

I think, therefore, though I have felt that there is some difficulty in coming to a conclusion in the case, that the declaration does not disclose a cause of action under the covenant, and that the judgment should be for the defendants on the demurrer on that ground.

MCLEAN, J.—The covenant required to be entered into by the bailiff of every division court by the 25th section of ch. 19, Consol. Stats. U. C., and required by the 26th section to be filed in the office of the clerk of the peace before the duties are entered upon, must be according to a form given in the statute, or in words to the same effect, and must be with so many sureties, being freeholders and residents within the county, and in such sums as the county judge may direct, and under his hand approve and declare sufficient. It is not made in the name of any person as covenantee, but is an undertaking or covenant by the parties executing it, jointly and severally, that the bailiff *shall duly pay over to such person or persons entitled to the same all such moneys as he shall receive by virtue of his office*, and shall and will well and faithfully do and perform the duties imposed on him as such bailiff by law, and *shall not misconduct himself in the said office, to the damage of any person being a party in any legal proceeding.*

The declaration sets out the covenant of the defendants, and the amount in which they are severally held as sureties for the defendant Cool, and not being executed with any person it could not shew with whom it was executed, so that the objections taken on these grounds wholly fail.

Then the 27th section of the statute provides that the covenant may be sued on by any person who may be damnified by the misconduct of a bailiff of the division court, and the facts are set forth in the declaration to shew the damage which the plaintiff seeks to recover, so that it was not necessary in the declaration to shew further the right of the plaintiff to sue and the liability of the defendants to be sued in the premises.

The declaration alleges that the defendant Cool being bailiff, and having as such an execution in his hands at the suit of one Galbraith against Donald Black, *under pretence* of such *execution, wrongfully, unjustly, and unlawfully* seized, took and carried away the plaintiff's goods, and unlawfully sold them, and as such bailiff received the proceeds of the sale. If Cool while bailiff *wrongfully* seized the goods of one man *under the pretence* of an execution against another, I do not see how in doing so he could be considered to be acting in the discharge of his duty as bailiff; it would in truth be contrary to and out of the scope of his duty as such; and if he received money in consequence of such *pretended and illegal act*, it could scarcely be considered as *money received by virtue of his office*, for the payment of which to the party or person entitled the bail became bound. But it is shewn that with respect to the goods, and the money when made by the sale of them, Cool procured an interpleader issue, and that the party who issued the execution and the present plaintiff were called before the judge of the county court, and a judgment given that the plaintiff was the owner of the goods sold, and entitled to the proceeds realized from the sale by Cool. The fact of defendant Cool calling the parties interested to interplead respecting the goods and money arising from the sale of them, which is stated in the declaration, shews that Cool was acting in his character as bailiff, and that as such he rendered himself individually

liable, though he could not thereby render his securities liable for his acts of trespass. If the plaintiff was entitled by the decision of the judge on the interpleader proceedings to the money then in the hands of Cool, as bailiff, it undoubtedly became the duty of Cool, as stated in the declaration, to pay it over to the plaintiff as the person entitled to the same. He could have no right to retain it to his own use, or to pay it over to the plaintiff in the execution, and if the amount had been then paid over to the present plaintiff Cool could shew such payment in mitigation of damages in the county court suit.

The plaintiff was not bound to accept the amount for which his cows were sold at a bailiff's sale in satisfaction for the trespass committed in taking them, and he could not be prevented from suing for such trespass with a view to recover damage for the taking, and for any difference between the value and the price realized. He pursued his remedy, and has recovered in the county court against Cool. If that verdict and costs of suit were paid, then the plaintiff could have no claim on Cool or his securities, but being wholly unpaid, the plaintiff has a right to recover the money to which he was entitled under the judgment in the interpleader proceeding. It is for that, as I understand the declaration, and not for the amount of the judgment in the county court, that this action is brought. The declaration alleges that the judgment in the interpleader proceeding was that the goods seized were his property, and that he was entitled to the money realized by the sale of them, *with the costs of the said proceedings*, and it alleges as a breach of the covenant that Cool did not pay to the plaintiff the money so realized, *or the costs so incurred*. Now the costs of an interpleader proceeding between Galbraith and this plaintiff could not possibly be adjudged to be paid by Cool, and his securities cannot be liable for his not paying them; these costs could only be payable by Galbraith, a party to the proceeding. So far, then, as that portion of the alleged breach of covenant goes, the plaintiff cannot be entitled to recover, but any money in the hands of Cool, *as bailiff*, may be recovered against his securities, if not paid over to the person entitled

to the same. It appears to me that it is sufficiently shewn that there were moneys in the hands of Cool as bailiff to which the plaintiff was entitled, and that not being paid over the plaintiff is entitled to maintain an action against the defendants as sureties.

Then as to the sufficiency of the plea, it appeared to me at the first view that the defendants should not say in the same plea that Cool had paid over all the money he received by virtue of his office as bailiff, *to which the plaintiff was entitled*, and that he had not misconducted himself to the damage of the plaintiff *in any suit or pleading to which the plaintiff was a party*. The covenant contains two provisions, the infraction of either of which would render the bailiff's sureties liable; the first, relating to the payment over of any moneys received by virtue of his office as bailiff, and the other, that he shall not *misconduct himself in his office*, to the damage of *any person being a party in any legal proceeding*. The plaintiff does not complain apparently of *misconduct* by Cool to *him* as a *party in a legal proceeding*, though he must be *considered* as a *party to a legal proceeding* when he appeared before the judge to contest under the interpleader summons the title to the goods seized. He complains of the non-payment of the money adjudged in that proceeding to belong to him, and he alleges that Cool misconducted himself in his office of bailiff. That must be taken to refer to the non-payment of the money, and the defendants might, perhaps, confine their plea to the specific ground of complaint stated as misconduct on the part of Cool, but as Cool is charged with misconduct they cannot be wrong in traversing that charge.

I think, under these pleadings, that the plaintiff is entitled to judgment on the demurrers.

BURNS, J., concurred with the Chief Justice.

Judgment for defendants on demurrers,
McLean, J., dissenting.

VANVLECK ET AL., V. STEWART ET AL.

*Indian lands—Power of commissioners—*2 Vic., ch. 15; 12 Vic. chaps. 9, 30; 13 & 14 Vic., ch. 74; 20 Vic., ch. 26.

Semble, that the commissioners for restraining trespasses on Indian lands are not authorised to seize and sell timber cut by the Indians themselves, or by white people with their consent.

This was an action of replevin for 400 pine saw logs, tried at Cayuga, before *McLean*, J., and a verdict rendered for the plaintiff.

As to the greater portion of the logs, the question was only whether they had been bought by the plaintiff Vanvleck at a sale made by the public commissioners acting on behalf of the Indians, whose right to sell was not disputed; but as to a small number there was some evidence to shew that they had been purchased by the plaintiff from the Indians, or cut by their assent on their lands, and afterwards seized and sold by the commissioners to defendants. The learned judge charged the jury that logs cut by the Indians on Crown lands, called Indian reserve lands, in the township of Oneida, without license of the Crown, were not unlawfully cut, and that the Indians could legally cut and sell timber off of said lands without license from the Crown.

J. R. Martin obtained a rule *nisi* for a new trial upon the evidence, and for misdirection. He cited *Regina v. Hagar*, 7 C. P. 380; *Regina v. Baby*, 12 U. C. R. 346; *Miller v. Clark*, 10 U. C. R. 9; *Chisholm v. Seldon*, 1 U. C. Chy. Rep. 318; *Regina v. Strong*, *Ib.* 392; *Totten v. Watson*, 15 U. C. R. 392; *Consol. Stats. U. C.*, ch. 81; *Consol. Stats. C.*, ch. 23.

‘Upon the evidence, which it is not material to report, the court thought the verdict warranted as to all the logs, and it therefore became unnecessary to determine the legal question raised, but the Chief Justice in his judgment said upon this point:

“If it were necessary to consider whether these logs—supposing they had not gone through the process of a previous sale by commissioners as having been illegally cut on

Indian lands—could be properly seized and sold to the defendant, as it seems they were in the latter part of the year 1859, then I suppose that question would have to be determined upon a consideration of the statutes 2 Vic., ch. 15; 12 Vic., chs. 9 & 30; 13 & 14 Vic., ch. 74, and 20 Vic., ch. 26. I shall only at present say, that if it be thought advisable, as I dare say it is, for other reasons besides the preservation of the timber, to prevent white persons from buying from the Indians pine and other merchantable timber growing upon their lands, I take it the intention to protect it should be made more clear than it seems to be upon the existing statutes, for I do not see that saw logs cut on Indian lands by the Indians themselves, or cut by white people by the assent of the Indian occupants, are liable to be seized and sold by the commissioners for restraining trespasses upon the lands under any of the statutes referred to; but further consideration of the question might lead me to a different opinion.

Rule discharged.

THE CORPORATION OF THE CITY OF KINGSTON V. THE CITY
OF KINGSTON WATERWORKS COMPANY.

Agreement—Construction.

Held, that under the agreement between the city of Kingston Water Works Company, and the Corporation of the City of Kingston, set out below, the company were not bound to supply water gratuitously to the city for any purpose at more than twenty hydrants.

This was a special case stated for the opinion of the court by Robert Dalton, barrister, as arbitrator appointed by rule of reference in the cause.

The following are the material facts :

By articles of agreement, made on the 31st of December, 1850, between the city of Kingston Water Works Company, of the first part, and the city of Kingston, of the other part;—after reciting that the said company had determined to erect works for the purpose of supplying the said city with water, for the purposes and under the provisions of 12 Vic., ch. 158: that it had been agreed that the city should take eighty shares of stock of the said company, and should receive from them, in lieu of dividends, &c., thereon, a supply

of water, in the manner and on the conditions thereafter contained—it was agreed that the company should cause to be erected twenty hydrants in the thickly or principally built parts of the city, in such streets only as the water works company may cause pipes to be laid for the use of the said water works, and in such places therein as the said city of Kingston, or the council thereof, might appoint, and when and as soon as the said works are being constructed, for the purpose of supplying water thereat, free from charge, for extinguishment of fires in said city, and for watering the streets thereof in the summer season. The said hydrants when erected to be the property of the said city of Kingston, and to be kept in repair by said city. The said party of the first part further agreed to supply water from said water works when erected, for the use of such public baths as might be furnished gratis to the poor inhabitants of said city, and also, &c., &c. (Specifying other purposes; namely, for shambles in the market, for a fountain if built, &c.) It was then stipulated that the city should pay £1000 and interest for said stock, in the manner provided; and it was further agreed that the city should be entitled to and should hold, without power of assigning the same, however, eighty shares of the capital stock of said company, “receiving the water for the purposes aforesaid from said company, in lieu of dividend or participation in the profits of said water works company; and further, that the said city of Kingston shall keep the said hydrants, and all other hydrants which may be constructed by the said city, in proper and good repair at the expense of said city,” and that in case any damage should arise by reason of leakage from said hydrants, &c., the same damages should be paid by the city.

After the making of the above agreement the twenty hydrants mentioned therein were erected, and had been ever since used by the city under the agreement, and for the purposes contemplated thereby.

Afterwards, during the year 1856, the city erected twenty other hydrants beyond those mentioned in the agreement, which last had from that time been in use by the said city for extinguishing fires as occasion required. These additional

twenty hydrants were partly interspersed in the district covered by the twenty hydrants mentioned in the agreement, but a number were also placed in other parts of the city, and covered a large additional area. These additional hydrants were erected by the city in pursuance of a resolution of the city council, and at the expense of the city, and were found necessary by the said council for the purpose of supplying fire engines, and of giving such other assistance as might be useful for extinguishing fires and preventing the communication thereof.

The defendants contended that the plaintiffs were liable to pay the defendants for the use of the additional hydrants—that is, for the water supplied by the defendants by means of those hydrants; and a claim on that account was made by way of set-off in this action. The plaintiffs contended that the defendants were bound to furnish the water for the above purposes without charge; and this was the question to be determined.

Kirkpatrick, for the plaintiffs, cited 12 Vic., ch. 158, sec. 10. *Prince*, contra, cited Angell on Corporations, 160.

ROBINSON, C. J., delivered the judgment of the court.

We find nothing in the statute 12 Vic., ch. 158, incorporating the water works company, which can affect the question submitted to us. The tenth clause was referred to in the argument, but that only makes it the duty of the company to construct and place as many fire plugs at the expense of the city, and in such places as the city council may require. It does not compel the company to supply water gratuitously at such places for extinguishing fires, or for any purpose.

All therefore depends upon the contract which the parties entered into, and our opinion is that the contract does not bind the company to furnish water gratuitously to the city for any purpose at more than twenty hydrants.

If more hydrants have been erected by the city, or by the company at their request, and have been supplied with water, which the city has used, the company are entitled, we think, to be paid for such supply of water.

Judgment for defendants.

GRIMSHAW V. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

Notice requiring lands—Deviation from plan filed—Effect of—Arbitration—Ejectment.

The plaintiff, having been served with a notice by defendants requiring a part of his land for their road, refused to allow them to enter, but afterwards withdrew his opposition, on condition that it should not in any way prejudice his rights against the company, and the defendants then entered and constructed their railway. Arbitrators were appointed to determine the amount of compensation to be paid to him, but before the award had been made the defendants desisted from their notice, which the court held that they had a right to do, and the plaintiff therefore failed in an action brought by him upon the award. The company afterwards served another notice, and as the plaintiff did not appoint an arbitrator to act for him, the judge of the county court appointed one D. as sole arbitrator, who made an award, reciting that he had inspected the land taken, and awarding £364 10s. to be paid to the plaintiff. This sum the defendants paid into court, long before this suit, and they had continued in possession of the land since it was taken by them before the first arbitration.

It appeared that two lines for the railway had been surveyed and staked off through the plaintiff's lands before their first notice, and the line shewn by their plan and book of reference filed pursuant to the act was the first, which was not adopted, though in the notices served on the plaintiff the land required was stated to be that "staked off by the said company according to the plan of the said railway." The deviation however of the two lines was slight, much less than a mile, and it was admitted that the land embraced in each award was that actually taken for the railway. The plaintiff having brought ejectment for this land:—

Held, that he could not recover, for that, notwithstanding the deviation, he was confined by what had been done to his claim by arbitration for the land taken.

This was an action of ejectment brought by the plaintiff against the defendants to recover possession of all and singular those certain parcels or tracts of lands and premises now in the use and occupation of the defendants as and for their railway, over and on lots numbers 3, 4 and 5, in concession B. of the township of Hamilton.

There was no question as to the original title of the plaintiff to the said lots, but the defendants, by their notice of defence attached to the record, denied the plaintiff's title to the property described in the writ in this cause, and his right to the possession thereof, and also gave notice to the plaintiff that the defendants claimed title to the possession of said property, and to the property itself, under and by virtue of the provisions of the acts 16 Vic., ch. 37, and 14 & 15 Vic., ch. 51, and the proceedings taken thereunder by them with respect to said premises, and the award made

therein by John Stoughton Dennis, and also by the consent and acquiescence of the plaintiff; and that under said several acts and the facts under which they got and hold possession, the plaintiff cannot maintain this action against them.

The record was entered for trial at Cobourg, and withdrawn, it being agreed between the parties that if on the facts as hereinafter stated, the court should be of opinion that the plaintiff was entitled to recover, then the court was to direct a verdict to be entered for the plaintiff, and one shilling damages, but if the court should be of opinion that the plaintiff was not entitled to recover, then a verdict was to be entered for the defendants.

The material parts of the case stated were as follow:—

It was admitted by the defendants, at the instance of the plaintiff, that a plan and book of reference of the defendants' railway was filed by them in the office of the clerk of the peace for the united counties of Northumberland and Durham, on the 10th of August, 1854, in pursuance of the statute 14 & 15 Vic., ch. 51, sec. 10: that in point of fact two lines of railway were surveyed and staked off through the plaintiff's lands by the said defendants, previous to the service of notice as hereinafter mentioned, and that the line shewn on the said map was the first line which was surveyed and staked off. (A plan was put in exhibiting the relative position of the two lines; that called the "first line located," representing the railway as shewn on the plan so filed in the office of the clerk of the peace, and that called the "adopted line of Grand Trunk Railway," being the line in the present occupation of the defendants, and which was not shewn on the plan so filed as aforesaid.)

That on or about the 13th day of March, 1856, the defendants served the notice (a copy of which was set forth in the exemplification hereinafter set out) dated the said 13th of March, 1856, on the plaintiff, and that a short time thereafter Mr. De Grassi, the defendants' agent in regard to land matters, requested the plaintiff's permission to enter upon his land with workmen in order to construct the railway: that he, the plaintiff, refused such permission, and referred said De Grassi to his solicitor, Mr. Cockburn: that said De

Grassi accordingly went to see Mr. Cockburn on the subject, and that said Cockburn made the following statement, which was admitted by the defendants to be correct :—

“I was acting for the plaintiff as his solicitor, and had advised him not to allow the defendants to take possession or enter upon his lands. Mr. De Grassi, the defendants’ agent, came to see me on the subject of the plaintiff’s refusal to allow defendants to construct their railway across his lands. He, De Grassi, informed me that if such refusal was persisted in he would apply to the judge of the county court, on affidavit that the immediate possession of the plaintiff’s lands was necessary to carry on the construction of the railway under sub-section 19 of sec. 11 of 14 & 15 Vic., ch. 51. I referred to the statute, and finding that further opposition would be useless, I told De Grassi that I would advise Mr. Grimshawe to offer no further resistance, with this distinct stipulation, which De Grassi assented to, that such withdrawal of opposition should not in any way prejudice the plaintiff in his right as against the said company. I saw the plaintiff shortly after this conversation, and having advised him as already stated, he offered no further opposition, and the defendants’ work-people entered and constructed their present line of railway across the plaintiff’s lands, the same being the premises in question.”

On the part of the plaintiff, at the instance of the defendants, a copy of exemplification of the judgment of this court between these parties, entered on the 1st of April, 1859, was admitted, and set out; but it is reported at length in 15 U. C. R. 224, and is therefore not repeated here.

In that case this plaintiff sued these defendants on an award, to recover the sum of £3116 5s. 9d., awarded to him for his land taken by defendants for the purposes of their railway, but it appeared that defendants had given notice before the award that they desisted from their previous notice requiring the land and appointing an arbitrator, and the court held that they had authority to do this under the act, and that the award subsequently made was in consequence invalid.

It appeared in the same case that a new notice had after-

wards been given by the defendants, and that the plaintiff not having appointed any arbitrator in pursuance of it, the judge of the county court, upon the application of the Company, appointed J. Stoughton Dennis, of the city of Toronto, a sworn surveyor for Upper Canada, to be sole arbitrator.

It was admitted that Mr. Dennis was duly appointed, and a copy of his award was put in as part of this case.

It recited the powers of the company to take lands, &c.: that the plan and book of reference had been filed as required by the act, shewing that the railway was intended to pass through the plaintiff's lands: that the company required for the use of their railway, and had taken possession of and staked off therefor, a portion of his lots above mentioned: that due notice having been given, the plaintiff had appointed an arbitrator, and that the said J. S. D. having been duly appointed sole arbitrator, had viewed the said land and premises; and he awarded that the company should pay as compensation for the fee simple of the land so staked off as aforesaid, and all damages sustained in consequence of the railway, the sum of £364 10s.

It was also admitted that the defendants paid into court the sum awarded by the said John Stoughton Dennis, together with interest and commission required by the Railway Clauses Consolidation Act, long before the commencement of this suit.

And that the defendants were in actual possession of their present line of railway at the time of the first arbitration mentioned in the said special case upon which said judgment was pronounced, and that they had ever since continued to occupy the same, and that the lands and premises for the recovery of which this action was brought were the lands and premises embraced in each award.

Cameron, Q. C., for the plaintiff, cited *Rankin v. The Great Western R. W. Co.*, 4 C. P. 463; *Jannette v. The Great Western R. W. Co.*, *Ib.* 488.

Galt, Q. C., for defendants, cited *Furness v. The Caterham R. W. Co.*, 27 L. J. Ch. 771; *Doe dem. Armistead v. North Staffordshire R. W. Co.*, 16 Q. B. 526; *Doe dem. Hudson v. Leeds and Bradford R. W. Co.*, *Ib.* 796.

The statutes bearing upon the case are referred to in the judgments.

ROBINSON, C. J.—The Railway Clauses Consolidation Act 14 & 15 Vic., ch. 51, sec. 10, sub-sec. 3, which requires plans and sections in triplicate to be deposited of such alterations as are intended to be made in the line or course of a railway, applies only to “*such alterations as shall have been approved of by parliament.*” And it follows, therefore, that the next or 4th sub-section, in which it is enacted that “until such original map or plan, and book of reference, or the plans and sections of the alterations, shall have been deposited *as aforesaid*, the execution of the railway, or of the part thereof affected by the alterations, as the case may be, shall not be proceeded with,” must be taken in like manner only to refer to such alterations as have been approved of by parliament.

It could never have been intended that after a line of railway had been staked out, and a plan of the line filed, no deviation whatever should be made in it without applying to parliament, though the object of the change was merely to save or diminish a cutting or embankment, or to avoid a wood, by varying a few feet or yards to the right or left. The seventh sub-section of the same clause confirms this view, and so does the last paragraph of the ninth section.

I do not therefore consider that the defendants in this case were not at liberty to proceed in constructing their railway upon the line on which they did actually construct it, though it varied slightly (and much less than a mile) from that laid out on the map which they had deposited, and to proceed in the same manner as if they had strictly adhered to that line, although they had deposited no map or plan exhibiting the alteration.

But the defendants, it is said, did not proceed carefully and regularly in the steps they took for having the amount of compensation ascertained. I mean under their new notice given on the 3rd of July, 1856, for that alone and the proceedings under it can be material to be referred to, since the first notice and whatever was done upon it fell to the ground, and became of no effect, as we determined in the case between the same parties reported in 15 U. C. R. 224.

The defendants' notice of the 3rd of July, 1856, under which they claim to have a right to the land formerly belonging to the plaintiff, which the railway line now occupies, upon their paying £364 10s., the sum awarded by Mr. Dennis, refers to the land in respect of which the defendants thereby tender compensation, as being shewn on the map or plan of the Grand Trunk Railway, deposited in the office of the clerk of the peace, &c. That, however, was not the land which the railway had actually taken, though it was within the limits of the deviation permitted to them by the act, and the notice ought regularly to have stated that the land which the defendants had taken was "within the limits of the deviation allowed" by the statute, instead of referring to it as shewn in the map or plan. The seventh sub-section of the 11th clause provides for such cases.

Yet it may perhaps be reasonably contended that the statute not requiring in such cases any alteration of the plan deposited, or the depositing of any new plan exhibiting the alteration, and allowing deviations from the plan not exceeding a mile, the plan may be rightly referred to as being a description sufficiently particular within the act, though if the words, "or within the limits of deviation allowed," had been inserted, as the statute directs or suggests, the arbitrators and the proprietors would have had their attention thereby called to the fact that the land to be valued was not exactly that laid down on the map that had been deposited, but deviated a little from it. At any rate, the notice having been framed as it is we are to consider what effect, if any, that circumstance can have upon the case as regards the rights of the parties. If in consequence of it the arbitrator had valued a different tract of land from that which the company had taken actual possession of and are occupying, that might indeed make a very material difference to the prejudice of one or other of the parties, but that can hardly have been the case in this instance, because it is admitted in the case that the defendants were in actual possession of their present line of railway at the time of the arbitration, and have ever since continued to occupy the same, and the arbitrator states in his award that he has viewed the land. It may, therefore,

be fairly assumed that it was the land which he saw actually in the occupation of the company which he valued, and valued perhaps without being sensible that it deviated in some part or parts a few yards from the plan filed in the office of the clerk of the peace.

It is quite evident, too, that the plaintiff, though he declined to be present or to take any part in the proceedings before the last appointed arbitrator, was fully aware of the land that was intended to be valued and that was actually valued by the three arbitrators at £3116 5s. 9d., for he sued upon that award, declaring himself ready to convey the land, which he recognised in his declaration as land which the defendants had taken possession of.

It is stated in the case that the lands and premises for the recovery of which this action is brought, are the lands and premises *embraced in each award*. This shews that the money awarded in September, 1856, by Mr. Dennis, is given for the same land in regard to which the three arbitrators had made their award before, which award the plaintiff endeavoured to enforce; and it shews further that it is the land which the plaintiff was willing the defendants should continue to occupy, provided he was compensated in the manner he was contending for.

The plaintiff, therefore, must abide by the remedy by arbitration: that is, I mean, by the legal result of it; and if he has not had the benefit of that remedy legally carried out, his efforts for redress must be confined to the pursuit of this remedy, if any thing has been left imperfect, which I do not take upon me to pronounce. He could never, after what has occurred, be allowed to treat the defendants as trespassers *ab initio*, or to eject them from the railway, which they have constructed at the expense of some millions of pounds, and in which large and various interests, public and private, are involved.

The principles on which the cases were decided which were cited in the argument, *Doe dem. Armistead v. The North Staffordshire R. W. Co.*, (16 Q. B. 526), and *Doe dem. Hudson v. The Leeds and Bradford R. W. Co.*, (Ib. 796), apply, I think, clearly to the present case. I refer also to *Adams*

v. The London and Blackwall R. W. Co. (6 R. W. Cas. 271); Lester v. Lobley, (7 A. & E. 133); Rankin v. Great Western R. W. Co., (4 C. P. 463), and to Redfield on Railways, an American work, p. 189; ch. 12, sec. 3; and ch. 13, sec. 4.

It has been argued that what distinguishes the case before us from some of those cited, is that the defendants, the Grand Trunk R. W. Co., did not take possession with the assent of the plaintiff, but against his will, and that, however unreasonable it might seem to allow him to maintain ejectment against the defendants if they had with his consent entered into possession of his land, and constructed permanent works upon it at a great expense, yet that it cannot be unreasonable, however hard might be the consequences, if the possession should be held to have been taken, as the plaintiff contends that it was, without his assent.

But the case shews that in fact the plaintiff did assent to the defendants taking possession. After they had served the first notice of arbitration, he advised with his counsel, and was told correctly that he could not effectually oppose the company's taking possession, for that if he resisted, a judge's warrant could be obtained under the statute, sec. 11, sub-sec. 19. Finding this, he assented, and as the case states, "he offered no further opposition, and the defendants' work-people entered and constructed their present line of railway across the plaintiff's lands, *the same being the premises in question.*" It is true that he stipulated that his withdrawal of opposition should not in any way prejudice the plaintiff in his right as against the company, but the plaintiff's subsequent proceedings shew clearly, (what it would be reasonable at any rate to have inferred,) that what he meant by that was that he should be in no manner or degree prejudiced in regard to his right to compensation for his land. He consented to defendants' taking possession without putting themselves to the trouble of obtaining a judge's warrant, but on the understanding that he was not in consequence to stand in any worse situation in regard to his rights than he would have been in if such a warrant had been applied for and obtained and possession taken under it. That the judge could legally have granted such a warrant is clear, for the land

was within the limits of the deviation from the line laid down on the plan deposited in the proper office, and there is no doubt that the law authorised the company to enter the land and construct their work upon it.

They entered into possession legally, for the purpose of permanent occupation, and with a view to construct their work upon it, and they did this with the knowledge and acquiescence of the plaintiff, who on his part concurred with them afterwards in a proceeding with a view to obtain compensation by arbitration for the very land thus taken. They could legally have obtained possession, and could have constructed their work where they did, without the plaintiff's consent; and if they had done so, it would no more have been competent to the plaintiff than it is now to dispossess the defendants by ejectment of the land on which they had legally entered, and legally constructed their work. The plaintiff in either case would equally be confined to the remedy by arbitration which is given by the statute. If there be any room for a question between the parties, in my opinion it can only be for this question,—whether the plaintiff is bound by the award made by Mr. Dennis, and if he be not, then whether any and what other proceedings are open to him for obtaining compensation, for if the defendants entered legally and constructed their work with a view to permanent occupation, as there is no doubt they did, then no wrong has been done, and the defendants cannot be deprived of their railway some years after it has been completed and in use. The plaintiff in his declaration expressly seeks to recover what he alleges to be his land, “now in the use and occupation of the defendants as and for their railway,” and he admits that the land for which he sues is the same land that was embraced (or referred to) in each award. This shews that he was under no mistake as to the land for which he was claiming compensation in the former action, though it was not precisely the land laid down in the map deposited, but was within the limits of deviation allowed to the company by law; and having endeavoured to obtain compensation for it as for land legally taken possession of by the defendants, with a view to permanent occupation, he cannot maintain

ejectment for the land. If not bound by the award made by the sole arbitrator, he must pursue any further remedy for compensation that is open to him.

In my opinion a verdict should be entered for the defendants.

McLEAN, J.—The plaintiff, notwithstanding the first award or reference to which he was a party, now contends that he is entitled to recover possession, because the site of the railway is not that laid down in *the plan deposited in the office of the clerk of the peace*; but he let the defendants into the possession of the ground, or rather desisted from opposing the entrance of their workmen for the purpose of constructing the road, well knowing the particular line on which the road was to be made, and he arbitrated with respect to the price to be paid for the line of road now sought to be recovered. If he had resisted, and refused to allow the defendants and their workmen to enter on the ground, the defendants could have proceeded in the manner pointed out by the 19th sub-section of the 11th section of the act referred to, and could have procured a warrant from the judge of the county court to put the defendants in possession of the ground to enable them to proceed with their works. If then the defendants had been put in possession under such warrant, and had proceeded and completed the line of railway across the land of the plaintiff, they could not afterwards be dispossessed by the plaintiff because a difficulty had occurred as to the amount of compensation to be made or the manner of ascertaining such amount. Then, if it became unnecessary to procure such a warrant, by the plaintiff consenting to the defendants proceeding with the works on the line of road pointed out by them in their notice, he cannot be in a better position than if he had continued to the last in his resistance. It cannot be that any person who has permitted a railway company to proceed with the construction of their road across his land, can at his mere will and pleasure afterwards stop up that road as his property, or bring an action of ejectment to recover it back after the expenditure, perhaps, of thousands by the company in the making of the road. On

this ground, therefore, I think this action cannot be maintained.

But there is also another ground on which the plaintiff must fail. It is admitted that an award has been made by J. Stoughton Dennis in favour of the plaintiff for a certain amount as compensation for $7\frac{29}{100}$ acres of land taken by defendants for their railway, and the damages occasioned thereby, and that the amount awarded has been paid into court. That award is still in full force, and cannot be assumed to be invalid though not accepted by the plaintiff. By the 20th sub-section of section 11 of 14 & 15 Vic., ch. 51, it is provided that, if for any reason the company shall deem it advisable, it shall be lawful for them to pay such compensation into the office of either of the superior courts for Upper Canada, with the interest thereon for six months, and to deliver to the clerk of the court an authentic copy of the award or agreement, "and such award or agreement shall thereafter be deemed to be the title of the company to the land therein mentioned." If then the award made by Mr. Dennis is a valid award, and I think it must be so considered in the absence of any thing to impeach it, the defendants having paid the money into court on the plaintiff's refusal to execute the proper conveyance, and having filed a copy of the award, must be taken to have acquired a *title* to the land in question, under which they may hold against the plaintiff, the former proprietor.

It appears to me that the plaintiff cannot assert any right to the possession of the land. All that he can claim is compensation for it, and if the amount of such compensation has not been legally ascertained he is still entitled to pursue his remedy in that respect. If the award of Mr. Dennis has been made as prescribed by the statute, then I apprehend that the plaintiff is concluded by it, and that he can claim no more than is awarded by it. The 18th sub-section of section 11 provides that no award shall be invalidated for want of form or other technical objection, if the requirements of the act have been complied with, *and if the award shall state clearly the sum awarded, and the lands or other property for which such sum is to be the compensation.* I do not see any

ground of objection in these respects to the award of Mr. Dennis, but it may nevertheless be liable to objections as to the mode of proceeding or other matters, with respect to which no opinion can now be formed.

BURNS, J.—The question in this case now is not whether the second award made by Mr. Dennis is a good award, and that under it the defendants have acquired title to the land in question, but it is whether, after what has taken place between the parties, the defendants have so far acquired an interest in the premises as deprives the plaintiff of maintaining an action of ejectment, and whether the circumstances do not compel him to adopt some other remedy.

The plaintiff contends that he can repudiate every thing done, as well on his part as on the part of the company, because that in fact the land appropriated for the track of the railway deviated from the plan mentioned in the notice given by the defendants of what they required. We see, however, that the proceedings in respect of the first arbitration took place, and the valuation of the land was made of that part actually occupied by the track, and this was done with the assent of the plaintiff. It is true that he protested in the first instance against the defendants entering upon the lands at all until the question of compensation was settled, but on being advised that the company could assume possession, he then went on to arbitration, not willingly, but as it were compulsorily. Giving him the full benefit of that, still it is quite clear that his objections were not grounded upon any supposed defect in the plans filed and notices with respect to the land required by the company for the track of the railway, but were based upon the proposition that he could successfully resist any entry upon his lands at all. When he found he could not do that with any success, then he assented to the arbitration by naming an arbitrator on his part, and when the company gave him notice that they desisted from that arbitration, he persisted in it, thus placing his claim upon the footing of compensation. Now, suppose the second award to have been irregularly obtained, and that the plaintiff is in no way bound by it, still that fact does not

in the least alter the position of the parties in respect to the question whether the plaintiff can resort to an action of ejectment to recover back the land. Considering that the legislature has thought proper to take away the rights of individuals to a certain extent, in granting railway companies the right to take private property, and to make it matter of compensation to the holders, whether individuals are opposed to the railway or not, we should not be doing justice to the public, who may be said to have acquired an interest in the matter after the railway has been completed and in operation, to allow private individuals—who so far have been assenting parties to the taking of the land for the purposes of the railway, as to have reduced their claim to one of compensation for the land—to support actions of ejectment and dispossess the company. If the plaintiff can now resume what was his, namely, the land, by means of this ejectment, it must follow, I think, that the company would have no means of compelling him to part with it. The company would be obliged to pay, in order to obtain it, any amount the plaintiff might think proper to ask. The 11th clause of the Railway Clauses Act, with its sub-sections, would not cover a case where the railway was completed and in full operation, under circumstances like the present, so as to give the company the power now of proceeding under them to re-establish their occupation and use of the railway track. On the other hand, unless the plaintiff has by his conduct compromised his right to compensation, that claim stands upon as good a footing, since the service of the notice that the company desisted from the proceedings on the first award, as it ever did.

The simple question in this case is, whether the facts shew that the plaintiff may resume his land, or whether he is now reduced to compensation for it. I think there can be no doubt whatever that he cannot resume his land, but must resort to his claim for compensation.

Judgment for defendants.

McMULLIN v. MURDOFF.

Witness—Competency—Con. Stats. U. C., ch. 32, sec. 5.

An assignee of the plaintiffs for the benefit of their creditors, *held not an incompetent witness to prove a debt due to them, as being the person in whose immediate behalf the action was brought.*

The exception in the statute applies only to those in whose behalf *as beneficially interested* the suit is brought.

At the trial of this case, at Kingston, before *Robinson, C. J.*, it appeared that the plaintiffs were merchants and had failed, and their estate and effects were assigned to one McFarlane as trustee for the benefit of their creditors. He was called as a witness to prove the account, having been formerly a clerk of the plaintiffs. It was objected that he was incompetent to prove the case for the plaintiffs, being the *person in whose immediate or individual behalf the action was brought*, and therefore excluded by Consol. Stats. U. C., ch. 32, sec. 5.

The objection was not taken till after the witness had given his evidence. The learned Chief Justice allowed his evidence to go to the jury, subject to the exception. McFarlane swore that he was not a creditor of the estate, but expected to be remunerated for the expense and trouble he was put to in collecting the debts.

A verdict was found for the plaintiffs for \$139.6.

Draper obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved.

Richards, Q. C., shewed cause, citing *Stark Ev.* 3rd Ed. I. 168; *Lowe v. Joliffe*, 1 W. Bl. 364; *Sinclair v. Sinclair*, 13 M. & W. 640; *Melhuish v. Collier*, 15 Q. B. 878; *Sage v. Robinson*, 3 Ex. 142; *Hill v. Kitching*, 3 C. B. 299; *Doe dem. Wingrove v. Nicholl*, 13 Q. B. 126; *Black v. Jones*, 6 Ex. 213.

ROBINSON, C. J., delivered the judgment of the court.

The witness McFarlane if he had been a creditor of the estate would not on that account have been incompetent, as the case of *Black v. Jones* (6 Ex. 213) shews, for that would only prove that he had an interest in the result of the suit,

which is no longer a disqualification. His expecting to be remunerated for his trouble in collecting the debts does not signify; it could only furnish ground of remark to the jury as affecting possibly his credibility.—(Hill v. Kitching, 3 C. B. 299.)

Then it is to be considered whether the case of the witness McFarlane comes within the exception in the statute, as being “the person in whose *immediate or individual* behalf this action was brought.”

We have no doubt that the assignee of a bond in whose behalf the action is brought, as it must be, in the name of the obligee, cannot be admitted as a witness. But the difference between that case and the present is that the witness McFarlane had not here any interest in the subject matter of the suit, and was neither technically a party to the record nor interested. Strictly speaking the action is brought in his immediate behalf, if he directed it to be brought as assignee of the estate for the purpose of collecting the debts, as we assume he did, but the question is whether the statute can be taken to mean brought in his behalf *as the party interested*, or whether he is equally incompetent, although the suit is brought in his behalf only as a trustee for others. If the latter construction must be adopted, then the statute, though it was intended to relax the principles of exclusion by making evidence admissible which was not admissible before, would in this case have a contrary effect, for in Tomlinson v. Wilkes (2 B. & B. 397, 5 Moore 172,) it was determined that an assignee of a bankrupt may prove a petitioning creditor's debt if he has released his claim as a creditor, for as assignee he stands merely in the situation of trustee to the estate.

We think we must take the statute to exclude the witness (when he is not a party to the record) in those cases only where the action has been brought in his behalf as the party, or one of the parties, beneficially interested. In this case the only persons beneficially interested are the creditors, and the debtor himself, if there should be any surplus. The creditors might be witnesses, though interested, because interest alone is no longer a ground of exclusion, and this

action is not brought in their immediate and individual behalf, but through the agency of another party: that is, the assignee. It would seem very inconsistent that the creditors in whose behalf substantially the action is brought, and who are the parties beneficially interested, should be competent, and yet that the assignee is not competent, though he has no pecuniary interest in the suit and is not a party to the record.

Rule discharged. (a)

McGUIRE v. LAING.

Leave reserved to defendant to move—Jury unable to agree—Right to move.

When leave has been reserved to defendant to move to have a verdict entered for him on legal objections taken, and the jury not being able to agree are discharged, he cannot make the motion.

This was an interpleader issue, tried in the autumn of 1859, when the plaintiff had a verdict for 1s., and a new trial was afterwards granted.

It came on again to be tried at Whitby, before *Robinson, C. J.* There were certain legal grounds on which the learned Chief Justice thought the defendant was entitled to prevail, but as it was contended further on the defendant's part that a verbal lease to the plaintiff from his father, by virtue of which the plaintiff claimed to own the crop of wheat which was in question in the action, was a fraudulent contrivance to set up a pretended demise, he desired to take the opinion of the jury on that fact, and so let the case go to them, reserving leave to defendant, in case the jury should find for the plaintiff, to move to have a verdict entered for him.

The jury however could not agree, after being out great part of the day and all night, and they were discharged the next day.

McMichael now in this term moved upon the leave reserved, notwithstanding the jury being discharged, contending that he could call upon the court to give effect thus to the legal objections raised.

(a) See *Bonner v. Moderwell*, 9 C. P. 504, reported since the argument of this case.

ROBINSON, C. J., delivered the judgment of the court.

We think, when leave has been reserved to a defendant to move to have a verdict entered for him in case the jury upon the charge given shall find for the plaintiff, and when the jury not being able to agree in a verdict are discharged, it is not competent to the defendant nevertheless to move upon leave reserved.

Rule refused.

THE ESSEX BUILDING SOCIETY V. MARIA BEEMAN, EXECUTRIX OF ELAM BEEMAN.

Sale under power in mortgage—Ejectment by mortgagee—Building Societies—Application to set aside proceedings as instituted without plaintiffs' authority.

The plaintiffs, as mortgagees, having advertised the land for sale under a power contained in a mortgage to them by one B., it was purchased by L., who paid the money to the president, but had received no conveyance; and the president, with his concurrence, then brought an action of ejectment in the name of the society against the mortgagor, to enable them to give the purchaser possession. The defendant, after verdict for the plaintiffs, having applied to set aside the proceedings as brought without their authority,

Held, that there was clearly no pretence for such an application.

Remarks as to the right of a building society to bring ejectment in their corporate name, on a mortgage made to the president and secretary.

O'Connor obtained a rule *nisi* calling upon the plaintiffs, and on Charles Baby, Esquire, their attorney, to shew cause why the writ of summons in this cause, and the service, and all subsequent proceedings, should not be set aside, or further proceedings stayed with costs, on the grounds that the said attorney had no authority from the plaintiffs for instituting this suit; and why the attorney should not pay the costs of suit, and of this application. He cited Doe Hammek et al. v. Fillis, 2 Chitty Rep. 170; Hubbart v. Phillips, 13 M. W. 702; Robson v. Eaton, 1 T. R. 62; Shaw v. Ormiston, 2 P. R. 152.

A. Cameron shewed cause and cited Ch. Arch. Prac. 76, 77.

This rule was moved on an affidavit by defendant's attorney, Mr. O'Connor, that he was present at the trial of this cause at the assizes for Essex, in April last, and heard Mr. Baby, the plaintiffs' attorney of record in this action, give evidence on the part of the plaintiffs, and admit upon his cross-

examination that he was not retained or authorised by the plaintiffs in any way to institute or prosecute this suit, and that he brought the suit for the benefit of a person named Jean Langlois; that he, the deponent, until such admission was made by Mr. Baby was not aware that he had no authority from the plaintiffs, though he suspected that he had not.

The action was ejectment for 38 acres of land in the township of Sandwich.

The writ issued from the office of the deputy clerk of the Crown in Sandwich, and was dated the 28th of March, 1860.

The notice of plaintiffs' title was, that they claimed as mortgagees under a mortgage, dated the 13th of December, 1850, made by Elam Beeman to the president and treasurer of the building society (the society itself being plaintiffs in this cause) to which this defendant was also a party, and as mortgagees in another mortgage dated the 11th of June, 1853, and made between Elam Beeman, of the first part, and the president and treasurer of the said society, of the second part, and the now defendant, of the third part.

The defendant in her notice claimed to be entitled by descent from Elam Beeman, deceased.

A verdict was given for the plaintiffs upon the trial.

In answer to this rule, in affidavits made by Charles Baby, Esquire, and others, the following statements were made:— that the plaintiffs having advertised the land mortgaged for sale under the power given in the mortgages, in consequence of default in payments, one Daniel Langlois, as agent for his brother Jean Langlois, became the purchaser, or rather advanced the money due upon the mortgage: that Jean Langlois had an interest in preventing the property from being sacrificed, as he and others acting in concert with him had claims upon it, and upon the estate of Elam Beeman, under judgments: that upon or immediately after the day of sale, Jean Langlois' said agent paid the whole money due on both mortgages to Mr. Baby, who then was, and had been for several years before, and continued the president of the society: that this action was instituted in the name of the

society by Mr. Baby, then president, with the concurrence of Langlois' agent and under his instructions, as it was thought that the society should be in a position to put the purchaser in possession of the land sold to him, as had been usual in such cases, and also to save the expense of assignments and registration.

And the agent of Jean Langlois swore that he, as agent to his principal, had always been, and still was ready to assign or release the mortgages, on receiving the money due upon them by the mortgagor.

ROBINSON, C. J., delivered the judgment of the court.

It is plain from the affidavits that the defendant has nothing to complain of, and no pretence whatever for calling for the summary interposition of the court by staying proceedings.

The case of *Thames Haven Dock and Railway Co. v. Hall*, (3 Railw. Cas. 441), shews how little disposed the courts are to countenance such applications as the present, when made after verdict and without merits, which we think may clearly be said of the present case: we refer also to *Sepings v. Nokes*, (2 C. B. 292.) The mortgages in this case have not been assigned. The company retains the legal estate, though they have contracted to sell to Langlois, whose payment of the purchase money was not a payment by the defendant, and Langlois is moreover concurring in this action being brought as it is, for reasons which we think are quite satisfactory.

We cannot conceive what pretence the defendant can have supposed she had for making such an application, for she can have no right to the possession since her default made, and even at this late day it appears from the affidavits that she would meet with no difficulty in regaining the property if she comes with the debt and interest. There is really no ground for asserting that the action was brought without authority from the company, when it was instituted by their president.

This action of ejectment, we perceive, is brought in the name of the society, though the mortgages are taken to the

president and secretary. This would not have been regular under the first statute 9 Vic., ch. 90, but seems to be permitted by the subsequent act 13 & 14 Vic., ch. 79, sec. 1, and no objection has been taken that the society could not recover. Then they sue at the instance of the president upon the mortgage, upon which the mortgagor is in default, and having the legal estate they can of course recover it. The defendant, instead of making this application, should have paid and should pay the debt and interest.

Rule discharged.

SHAW V. SALMON.

Notice of non-payment—Promise to pay—Pleading.

Where it was shewn that defendant, an endorser, knowing that notice of dishonor had not been given, promised to pay, *Held*, that the plaintiff was entitled to a verdict on a plea denying notice.

Seemle, that it is only necessary to plead that notice was dispensed with, when an agreement to that effect had been made before the time for giving it.

ACTION on a promissory note made by George Salmon, the younger, and S. N. Annesley, in the name of Salmon and Annesley, on the 12th of July, 1856, payable to defendant George Salmon, or order, in six months, for £125. Defendant was sued as endorser.

Defendant pleaded—1. Traversing the alleged notice of dishonour. 2. Payment. 3. An equitable plea, alleging time to have been given to the maker. Issue was taken on all the pleas.

As the trial, at Simcoe, before *McLean*, J., a verdict was found for the plaintiff for £99 13s. 4d.

M. C. Cameron moved for a new trial, complaining of misdirection in regard to the issue upon the plea denying notice. He cited *Brownell v. Bonney*, 1 Q. B. 39; *Burke v. Elliott*, 15 U. C. R. 610; *Bank of British North America v. Ross*, 1 U. C. R. 199.

The facts are sufficiently stated in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

We think upon the evidence of the defendant's absolute

promise to pay, deliberately made, and with a knowledge of the facts, the defendant was entitled to a verdict upon the issue regarding the notice. We have several times so determined, since the case of the Bank of British North America v. Ross. The promise to pay was not made in this case without a good consideration. It was proved by a witness called by the plaintiff, and was not attempted to be disproved. Under such circumstances the judge was warranted in telling the jury that the issue on the plea should be found for the plaintiff, not on the ground that notice was in fact given, but because the defendant should not be heard to assert the contrary.

The decisions in England have varied on this point, but the current of authority is in favour of the position that there is no necessity to plead that defendant dispensed with notice, unless there was an agreement to that effect before the time for giving notice arrived.

Rule refused.

REGINA V. BULLOCK.

Embezzlement—Evidence—Money received by county treasurer for township—Indictment.

On an indictment against a treasurer of a county for embezzling the sum of £9 14s. 10d., received for taxes, it appeared that defendant received the money in October, 1858, and resigned in February, 1859, when his books were taken from him by the warden, although the usual time for making up his account with the county, 31st of March, had not arrived. This sum was not entered in his books as received, nor was there any entry of other moneys received for taxes at a later date; but after his books had been taken he sent in a list of moneys received, including this, although before he did so it had been stated in a newspaper that this and other payments were not accounted for. There was no proof that he was indebted to the county on the whole of his accounts, and it was shewn that he claimed that they were in his debt, and that the question was pending before arbitrators, to whom several civil suits between himself and the council had been referred. The jury found defendant guilty.

Held, that the evidence did not warrant the conviction, and a new trial was granted.

Held, also, that the money was not improperly charged to be the money of the county, though it was received for the township of Maidstone, and was to be accounted for to it by the county.

INDICTMENT for embezzlement of money received by defendant as treasurer for the county of Essex.

At the trial, at Sandwich, before *Richards, J.*, the prosecu-

tion was confined to proof of the embezzlement charged in the first count, which was for embezzling £9 14s. 10d., received from one George Tickle, as payment of taxes due by him as a non-resident landowner.

The defendant was found guilty, and was sentenced by the learned judge to be imprisoned for six calendar months.

Prince obtained a rule *nisi* for a new trial on the evidence, and on certain legal exceptions taken at the trial.

R. A. Harrison shewed cause, and cited Consol. Stats. U. C., ch. 54, secs. 184, 159, 160; ch. 55, secs. 111, 112, 113, 115, 121, 154, 155, 160, 164, 165, 166, 193; *Regina v. Welch*, 1 Den. C. C. 199; *Regina v. Wortley*, 2 Den. C. C. 333; *Regina v. Murdock*, *Ib.* 298; *Rex v. Grove*, 7 C. & P. 635; *Regina v. Jones*, 8 C. & P. 288. *Regina v. Lambert*, 2 Cox. C. C. 309; *Regina v. Overton*, 6 Cox C. C. 277; *Regina v. Lister*, 7 Cox C. C. 203; *Regina v. Arman*, *Ib.* 45; *Regina v. Betts*, 8 Cox C. C. 140; *Rex v. Jones*, 7 C. & P. 833; *Regina v. Jackson*, 1 C. & K. 384.

Prince and *A. Cameron*, supported the rule, citing *Rex v. Smith*, *Russ. & Ry.* 267; *Rex v. Hodgson*, 3 C. & P. 423; *Regina v. Norman*, *Car. & Marsh.* 501.

The facts of the case, and the objections taken, sufficiently appear in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

We have read the evidence, and we must say, seeing no more than that discloses, it would seem to have been a too stringent application of the criminal law, which has treated the defendant as guilty of embezzlement on account of what was proved in relation to the sum of £9 14s. 10d., proved to have been received by him.

We have no doubt that there is nothing in the defendant's objection, that the money belonged to the township of Maidstone, and is improperly stated in the indictment to have been the money of the county of Essex. He received it as treasurer of the county. It was properly paid into his hands, and though it was to be accounted for by the county to the town-

ship, yet from the moment it was paid to the defendant as treasurer for the county the county was responsible to the township for it, and had a special property in it, so that it was not improperly charged to be the money of the county, while it was in the defendant's care, under the provisions of an act of parliament.

But upon the merits of the case: it was proved that the defendant received this money in October, 1858: that he resigned his office in February, 1859, when his books were taken from him by the warden of the county. That they contained no entry of the receipt of the sum of £9 14s. 10d. is true, but then it was proved that according to the course of the treasurer's accounting he had until the 31st of March, 1859, to make up his account with the county, for moneys received and expended by him up to the 31st of December previous: that the county had instituted a civil action against the defendant for a balance which they claimed: that a reference to arbitration had been made in consequence, and no award made when this indictment was tried: that the defendant had sent in a list of moneys received by him, which had not been entered when his books were taken from him, which list included this £9 14s. 10d., though before he did so it had been stated in a newspaper that this and certain other payments had not been entered or accounted for: that the defendant as treasurer, had, from 1854, when he was appointed, till he resigned in 1859, been always in the habit, with the knowledge of the council, of making payments for the county, sometimes in advance of funds received, and afterwards in his account had taken credit for such payments and charged himself with moneys taken by him to replace such advances: that he claimed that the county was indebted to him at the time of trial; and that whether the county was so indebted or not was at that time submitted to arbitration, upon the reference of several civil suits pending between the council and the defendant and his sureties.

The prisoner paid over to the county when he resigned in February, 1859, \$376, as a balance which he then said he had in hands.

It was objected, that for all that appeared in evidence the

payments made by defendant might have included this £9 14s. 10d: that its not having been entered in the book was not proof of embezzlement, and certainly not conclusive, especially under the circumstances of his being deprived by the warden of his books before the period had arrived for closing his accounts: that it was not shewn that he was on the whole of his accounts a defaulter, or had embezzled or intentionally concealed the receipt of this particular sum.

The learned judge told the jury that before they could convict the prisoner they must be satisfied that he omitted to enter in his books the receipt of this money with an evil intent, meaning to embezzle the same; that if the omission arose only from negligence or oversight, or a defective method of keeping his books, he ought not to be convicted on this indictment; and it was remarked to the jury that the fact that the 31st of March was the time for making up the defendant's accounts for the fiscal year was material, for that had not yet arrived when defendant was deprived of his books: that there was no evidence to shew that in any account rendered by the defendant there was an omission of any moneys that had been paid to him; and there was, in addition, the further fact in defendant's favour, that there was no entry made in the defendant's books of any other money received for taxes on lands in the same township, of a later date than the time of this money being paid to him.

The jury upon that charge convicted the defendant.

We make absolute the rule for a new trial, not thinking the evidence sufficient to support a conviction, for it was not proved at the trial (whatever the fact may turn out to be upon the arbitrator's investigation) that the defendant was in fact a defaulter upon his accounts generally, and the evidence in relation to this payment of £9 14s. 10d. was not such, we think, when the circumstances are considered, as warranted the finding that that sum had been embezzled.

Rule absolute.

BOULTON V. JONES ET AL.

Promissory note—Condition—Estoppel by pleading.

“TORONTO, 12th May, 1858.

“Six months after date we promise to pay to J. B., or order, \$400. (Signed,) N. J., W. W. B., E. W. D. The above note is to be paid in merchantable lumber to be delivered in Toronto at cash price, and an additional quantity of lumber sufficient to pay the freight is to be sent in. If not so paid within the time, then the same is to be paid in cash.” This memorandum was written on the face of the note when it was signed.

Held, not a promissory note.

Held, also, that defendants were clearly not estopped from denying that it was a note by having, in addition to the plea of *non fecerunt*, pleaded other pleas in which they denied their liability to pay “the said promissory note.”

The plaintiff sued upon a promissory note, whereby defendants promised to pay him, or order, \$400, six months after date, for value received.

Defendants pleaded *non fecerunt*, and other pleas, on which issue was joined.

At the trial, at Milton, before *Burns, J.*, the plaintiff obtained a verdict for £89 10s., but defendants objected that the writing proved was not a promissory note, and leave was reserved to them to move in term for a nonsuit upon that objection.

In the special pleas put in the defendants set up certain facts, upon which they contended that they ought not to be held liable to pay “the said promissory note;” and the plaintiff contended that having in those pleas recognised the instrument sued on as a promissory note, they could not be permitted to contend, upon their plea denying the making of the instrument declared on, that the writing produced was not a promissory note.

The writing was as follows :—

TORONTO, 12th May, 1858.

\$400.

Six months after date we promise to pay to James Boulton, Esq., or order, the sum of four hundred dollars, for value received.

(Signed,)

NEVIN JONES,
W. W. BALL,
E. W. DEVEREUX.

The above note is to be paid in merchantable lumber, to be delivered in Toronto, at cash price, and an additional

quantity of lumber sufficient to pay the freight is to be sent in. If not so paid within the time, then the same is to be paid in cash.

S. M. Jarvis obtained a rule *nisi* to enter a nonsuit, pursuant to the leave reserved.

James Boulton shewed cause, and cited *Byles on Bills*, 75-6; *Cholmeley v. Darley*, 14 M. & W. 344; *Webb v. Salmon*, 19 L. J. Q. B. 34; *Hoare v. Graham*, 3 Camp. 57; *Free v. Hawkins*, 8 Taunt. 92.

ROBINSON, C. J., delivered the judgment of the court.

We think there is no force in the argument that the defendants are estopped by their pleas from contending that the instrument produced is not a promissory note.

The memorandum written as it is on the face of the note, and forming part of the instrument when the defendants signed it, we cannot, as we think, hold that the plaintiff proved the issue in his favour upon the plea of *non fecerunt*, for the defendants did not sign a promissory note when they signed that paper, which is conditional in its terms, and not payable in money. If not a note at the time, it did not become so afterwards by the fact of the defendants not having delivered the lumber before or when the note matured.—*Hill v. Halford*, (2 B. & P. 413.)

None of the cases cited in support of the action are at all in point.

Rule absolute.

BROWN V. GARDEN AND GIBSON.

Replevin—Avowry—Pleading.

Replevin—Defendant G. as landlord, and the other as his bailiff, avowed under a distress for rent due by T., to which the plaintiff pleaded that before making the demise the said G. and one E. owned the land, and before the taking complained of conveyed it to the plaintiff and R. in fee, who continued seised and entitled to the possession and rents until the demise and time when, &c.: that G. knowing the premises, fraudulently made said demise to defraud the plaintiff and R.: that by reason of the premises he had not at the said time any interest in the land; and that the plaintiff being entitled placed his goods there, where defendants wrongfully took them.

Held, on demurrer, plea bad, being in effect a plea of *nil habuit in tenementis*.

REPLEVIN.—Defendants justified seizing the goods under

a distress for rent due by three persons of the name of Taylor under a demise made to them by Gibson. Gibson avowed as landlord, and Garden as his bailiff, who made the distress.

The plaintiff pleaded, in substance, to this avowry, &c., that before the demise the said Gibson and one George Elliott were seised of the said premises in fee, and that afterwards, and before the taking of the said goods, Gibson and Elliott conveyed the premises in fee to the plaintiff, Brown, and one John L. Rannie, who became and continued seised in fee and entitled to the profits, &c., until the demise and to the said time when, &c.: that Gibson well knowing the premises, fraudulently and wrongfully made the demise mentioned in the avowry, for the purpose of defrauding the plaintiff and Rannie; and that by reason of the premises Gibson had not at the time of making the demise any right, title or interest to or in the premises, or any part thereof: that the plaintiff being possessed of the said goods seized, of his own right, and by the permission of the said Rannie, placed the said goods upon the premises in the avowry mentioned, where the defendants wrongfully seized them.

The defendants demurred to this plea, assigning as grounds of demurrer, that it did not admit, traverse, or deny the demise mentioned, but attempted to introduce a collateral issue, that the defendant had not power to demise the premises, and not having had power did so in fraud of the plaintiff and said Rannie: that the said plea did not deny the possession and occupation of said premises by the lessees under the demise, nor did it shew that they were evicted by the plaintiff or any other person before the time of said distress.

R. A. Harrison, for the demurrer, cited *Syllivan v. Stradling*, 2 Wils. 208; *Woodf. L. & T.* 689, 690.

W. Eccles, contra, cited *Smith v. Aubrey*, 7 U. C. R. 90; *Tennery v. Burnham*, 10 U. C. R. 298.

ROBINSON, C. J., delivered the judgment of the court.

This plea cannot, in our opinion, be supported, any more than the plea which was held bad in the case in this court of *Smith v. Aubrey* (7 U. C. R. 90). Brown,

the plaintiff in the present case, whose goods were distrained, was as much a stranger to the demise as Smith, the plaintiff, was in that case. This is in fact a plea of *nil habuit in tenementis*, denying the lessor's right to make the demise under which the tenant enjoyed, and such a plea has been held in numberless cases to be excluded by the 22nd section of 11 Geo. II., ch. 19. We can see no ground for taking this case out of the authority of *Syllivan v. Stradling*, (2 Wils. 208,) which was a case fully considered by the Common Pleas in England, and has been always since conformed to. We refer also to the cases of *Alchorne v. Gomme* (2 Bing. 54); *Johnson v. Jones*, (9 A. & E. 809); *Doe Higginbotham v. Barton*, (11 A. & E. 307), and *Parry v. House*, (Holt N. P. C. 489).

The plaintiff does not pretend that he was evicted. For all that appears it may be the case of a mortgagee disputing the right of a mortgagor, who has been allowed to remain in possession, to distrain upon a tenant who has enjoyed under a demise from him. It may be, though the statement of the plea in that respect is not quite distinct, that Gibson demised to the Taylors after he had sold or mortgaged the whole to Brown and Rannie; but if he did, that would only shew that he had no right to make the demise, and that is a defence which the tenants who had enjoyed under him could not set up, and which can as little be set up by any other person whose goods being upon the premises of which the tenants were in possession have been distrained upon for the rent due. Nor do we think that the circumstance which has been relied upon as a peculiarity in this case makes any difference: that is, that the plaintiff Brown, whose goods were distrained upon, though a stranger to the demise was the owner of the premises, or perhaps a mortgagee; for the truth of the case in that respect is not stated, but merely that the premises had been conveyed to him and Rannie in fee.

We need hardly say that the deciding that the plaintiff cannot plead *nil habuit*, &c., to the avowry does not affect the right of Brown and Rannie to the rents and profits, and cannot prejudice any remedy they may have, either to gain possession or to damages for use and occupation.

Judgment for defendants on demurrer.

REGINA V. MOYLAN.

Libel—Pleading.

A plea to an information for libel under the Consol. Stats. U. C., ch. 103, sec. 9, must allege the truth of *all* the matters charged; and, *Held*, upon the information and plea set out below, that the plea in this case was clearly insufficient in that respect.

This was a criminal information, charging that John Hillyard Cameron, one of her Majesty's counsel learned in the law in Upper Canada, Grand Master of the Loyal Orange Association of British North America, had been duly appointed and was acting as Crown prosecutor for and on behalf of our lady the Queen, at the court of Oyer and Terminer and general gaol delivery, then being held in the City of Toronto, in and for the united counties of York and Peel, and as such Crown prosecutor had at the said court prosecuted and conducted a certain indictment against one Robert Moore for the murder of his wife, upon which the said Moore had been arraigned and pleaded "not guilty," and upon his trial therefor had been found guilty, by the jury empanelled on his said trial, of manslaughter: that James G. Moylan, of Toronto aforesaid, contriving and intending to injure and aggrieve the said John Hillyard Cameron, and to cause it to be believed that he had acted corruptly in his conduct of the said trial as such Crown prosecutor as aforesaid, and that he had wilfully perverted the course of justice, and had prevented the conviction of the said Moore for the crime of murder on the said trial, falsely, wickedly, unlawfully, and maliciously, to wit, on the 4th of November, 1859, did compose, print and publish, and did cause and procure to be composed, printed and published, in a certain public newspaper called "The Canadian Freeman," a certain false, wicked and malicious libel, of and concerning the said John Hillyard Cameron, and of and concerning him as such Crown prosecutor at the said court, upon the said trial of the said Moore as aforesaid, which said false, wicked, and malicious libel was to the tenor and effect following: that is to say,—(Those parts of the libel that seem immaterial to the pleadings are omitted.)

“How Orange Law Officials discharge their duty!!!”

“Messrs. J. H. Cameron and R. Dempsey screening a wife murderer!!!”

“More than once have we had occasion to express our utter want of confidence in the manner in which criminal law is administered, so long as the secret grip and pass-word, and infamous oath of infamous secret societies exert their polluting influence over the officers of justice, from the judge on the bench and the prosecuting Crown counsel down to the meanest subaltern about the law court. Repeated instances could be adduced to prove that trial by jury in this city is a mere farce when an Orangeman is implicated, either as plaintiff or defendant. * * *

“One of the most glaring instances perhaps on record of this gross perversion of justice and malfeasance on the part of law officers, happened in this very city, and during the present sitting of the court of assize. The facts recorded by our contemporary, the ‘York Herald,’ if investigated and established before the proper tribunal, are sufficient to call forth an expression of general horror, and stamp with the seal of infamy the character of the base bad men who have betrayed the trust confided to them, and made use of their position to vitiate justice, and shield from condign punishment the worst of malefactors.

“We allude to the case of Robert Moore, who, &c., &c., (stating the principal facts of the case.) Such are in brief the main features of the case. Now for the after-plot. It appears that Moore is an Orangeman, the principal witness against him a Catholic. Every effort has been made by members of the Orange order, not only to procure a light verdict, but if possible to clear the criminal altogether. The article which we extract from the ‘Herald,’ a journal published in the place where the murder was committed, and therefore supposed to be ripe on all the details connected with the crime, will shew to what extent Messrs. Cameron and Dempsey, the Crown counsel and county attorney, conspired to defeat the ends of justice.

“We gave a report in full of the coroner’s inquest, since which time several additional facts have come to light, which we supposed would of course be elicited at the assizes when Moore was brought to his trial, more especially as the witnesses were subpoenaed; but great was the astonishment and indignation of every one present, when they found that these witnesses were not examined. * * *

“So much for the value of the evidence given in Moore’s favour. But after all this is not so bad as the fact that seven

material witnesses were not examined at all, although they had the subpoenas in their pockets. We unhesitatingly affirm, that had these persons been put upon their oath, and sworn what we have heard them state, that their narration of the vile and fiend-like acts of cruelty of the prisoner to his wife, would have horrified anybody only to hear. Why, we ask, was not the woman who attended Mrs. Moore in eight confinements put upon her oath? What was the county attorney, R. Dempsey, Esq., about? He subpoenaed her—why not then hear her evidence? It makes one shudder only to listen to what she relates. Why was not Mrs. Burns and several others also examined? * * *

“No wonder that crime increases when so little effort is made to convict the guilty; for actually, with the witnesses before them, so indifferent are our law officers to the majesty of the law, they are too indolent to have them put in the box. We have heard before that law and justice are at a low ebb in Canada, but never before did we feel its truth as now. All through this part the indignation is extreme against such a mock trial as that of Moore was proved to be. * * *

“Have we not here the strongest and most damning proof of the total disregard for the oath which Messrs. Cameron and Dempsey took when entering office, to perform their duties faithfully and impartially? But why speak of oaths? Does not their extra-judicial oath of Orangeism set aside and render nugatory every other oath? Did not Mr. J. H. Cameron, after the last parliamentary election, constitute himself the legal champion of Orangeism, and pledge himself to help every brother Orangeman through any difficulty in which he might get entangled. The case of Moore, the wife-murderer, has afforded the grand master and Queen’s counsel a most excellent and laudable opportunity to give an earnest of his intention to redeem his promise. Here, though there was no necessity to call into requisition his legal lore and affected declamation, Mr. Cameron more effectually assisted his brother in trouble by withholding such evidence as must have forced even an Orange jury to render a verdict of murder. If there be a shred of morality or religion left in the country, if the public be not content to see the very fountains of justice polluted, if we be not altogether dead to the disgrace and ignominy which must necessarily attach to our system of criminal legislation, if we have any reverence for the sanctity of the law, if we value the safety of human life, it is high time to put an end to such nefarious proceedings. The facts connected with Moore’s case are so glaring and flagrant that we cannot conceive how the Crown counsel and county attorney can escape prosecution and punishment. If the ‘Herald’

speaks truth, there cannot be a shadow of a doubt upon the mind of any unprejudiced man, that they have disgracefully participated in defeating the ends of justice. Is there no law, we ask, to reach those men? Can such an outrage be inflicted upon civilized society with impunity? Is the worst of murderers, because a wife-murderer, to be shielded from adequate punishment because of his being an Orangeman? That Cameron and Dempsey have been guilty of complicity with the friends of Moore, is evident from the statements of the 'Herald.' Such being the case, we call upon our contemporary, and the other respectable parties at Richmond Hill, who are cognizant of the facts referred to in the 'Herald,' to impeach before the competent and proper tribunal those unjust, unscrupulous, and perjured law officers."—To the great damage and scandal of the said John Hillyard Cameron, to the evil example of all others in like case offending, and against the peace of our said lady the Queen, her Crown and dignity.

PLEA.—That it is true, that upon the said trial of the said Robert Moore, in the said information mentioned, the said John Hillyard Cameron neglected and omitted to call to give evidence on behalf of the Crown the following, among other witnesses who were subpoenaed on behalf of our lady the Queen, and present in the said court at the said trial ready to be examined if they had been called on, and who could have given important testimony against the said Moore relating to the matter in issue between our said Lady the Queen and the said Robert Moore, on the said trial: to wit, Nancy Burns, Mrs. Hughes, Mrs. Arksey, Mrs. Williams, William Harrison, and James M. Jenkins; and the said James G. Moylan further saith, that before and at the time of the publication of the matters in the said information mentioned the said Robert Moore was an Orangeman, or member of the secret society denominated the Loyal Orange Association of British North America, of which the said John Hillyard Cameron is the leader or head, denominated, as in said information set forth, Grand Master: that the society then was, and is, a political religious society, the members whereof were and are united by secret oaths and ties to aid and assist each other as brothers, and are hostile in spirit and feeling to the professors of the Roman Catholic religion and church, of which church a large portion of the subjects of Her Ma-

jesty in this province are members, and are entitled to the protection of the laws of the land, and interested in the due administration thereof equally with the rest of Her Majesty's loyal subjects; and the said James G. Moylan further saith, that before and at the time of the said trial of the said Robert Moore, and of the said publication in the said information mentioned, the said James G. Moylan was, and still is a Catholic, and editor of a public newspaper or journal published in the city of Toronto called the "Canadian Freeman," being the paper in the said information mentioned: that as such editor he had become aware of frequent instances in which justice in this province had failed in its due course, where a member or members of the said secret association, of which the said John Hillyard Cameron is so the head or grand master, had been tried for criminal offences or outrages upon Roman Catholics, by reason of brother Orangemen having been upon the jury by whom such offences were tried; and the said James G. Moylan further saith that before and at the time of the said trial, and of the said publication, there was, and still is, a distrust among Catholics generally that they were and are not secure in their lives, liberties and properties, and will not receive impartial justice in the courts of the province when members of the said secret association were or are interested against them, by reason of the influence possessed by the members of the said Orange association in Her Majesty's courts of justice, through and by means of their oaths and ties of fellowship and secret signs, and their hostility to Roman Catholics. That the Roman Catholics of this province, constituting a very large portion of the inhabitants thereof, cannot place confidence in the administration of justice when it is placed in the hands of leaders of the said association; and by intrusting the prosecution of criminals, or persons accused of crime, to members of the said association great discredit is brought upon the administration of justice, and a feeling of insecurity pervades a large portion of Her Majesty's subjects. And the said James G. Moylan further says, that for the well-being of the province it is absolutely essential that all classes of Her Majesty's subjects should have confidence

in the administration of the laws, and that such confidence cannot exist where the conduct of criminal prosecutions is entrusted to members of the said society ; and that he, the said James G. Moylan, being fully of this belief, and having read the statement from the "York Herald" mentioned in the said information respecting the said trial of the said Robert Moore, and believing the same to be true, and that there had been a miscarriage of justice in the case of the said Robert Moore, published the said matters in the said information set forth, with the view to the public discussion of the propriety and right of the government of this province to place in the hands of a leader of an oath-bound secret political association the conduct and management of criminal prosecutions, and the consequent power of adducing or withholding evidence at pleasure, and without any personal feeling against the said John Hillyard Cameron. By reason whereof it was for the public benefit that the said matters so charged in the said information should be published.

Demurrer to this plea, as insufficient.

Eccles, Q. C., for the demurrer, cited Consol. Stats. U. C. ch. 103, sec. 9.

M. C. Cameron, contra, cited *Clarke v. Taylor*, 2 Bing. N. C. 654.

ROBINSON, C. J., delivered the judgment of the court.

The statute on which this plea is framed, Consol. Stats. U. C., ch. 103, has made a change in the law of libel, which may prove of great advantage to the publishers of newspapers or other public journals, in cases where they have stated certain facts, however injurious to the character of an individual, which they may know to have occurred, or which they find stated upon such authority that they are satisfied they can venture to rely upon being able to prove their truth if it should be questioned.

In such cases, where the public have an interest in the matter to which they have resolved to give further publicity, and where they do not give with their article any injurious comments evidently dictated by malice and in a spirit of

exaggeration, the statute affords them a fair degree of protection by enabling them to plead by way of justification "*the truth of the matters charged*," which was formerly no defence against a criminal prosecution, and to plead also, as a part of such defence, that it was for the public benefit that such matter should be published.

The defendant is allowed to plead this in addition to the plea of "not guilty," and if the special plea is pleaded in a manner conformable to the statute, then it will be for the jury upon the trial, if they find that the defendant has published the alleged article, and that it is a libel, to find also whether the matters—that is, all the matters—charged in the libel are true, and whether it was for the public benefit that it should be published.

This special plea has not yet been submitted to a jury, because on the part of the prosecutor it is denied to be such a plea as the statute requires or admits, and it is contended that if what is stated in it were proved to be true it would not constitute a defence under the statute.

All that the plea asserts as a justification, so far, we mean, as the truth of the charges is concerned, is, that the prosecutor, John Hillyard Cameron, "neglected and omitted to call to give evidence on the part of the Crown the following, among other witnesses who were subpoenaed on behalf of the Crown, and were present in court at the trial of Moore, to be examined if they had been called, and who would have given important testimony against the said Moore relating to the matters in issue (enumerating six witnesses): that the defendant having read the article in the "*Herald*," and believing the same to be true, and that *there had been a miscarriage of justice in Moore's case*, published the matters in the information set forth, with the view to the public discussion of the propriety and right of the government to place in the hands of a leader of an oath-bound secret political association the conduct and management of criminal prosecutions, and consequent power of adducing or withholding evidence at pleasure, and without any personal feeling against the said John Hillyard Cameron—*by reason whereof* the defendant alleges, it was for the public benefit

that the said matters so charged in the said information should be published."

It is the plain intention of the statute, and in the case of *Regina v. Newman* (1 E. & B. 568) it is laid down, that a plea under the statute must affirm the truth of all the charges, and not merely that some of them are true, or that the defendant believed them or some of them to be true. Now in this case the plea only affirms that John Hillyard Cameron neglected or omitted to call certain witnesses who had been subpoenaed and were in attendance. It does not affirm that it was true, as the article published asserts, that John Hillyard Cameron betrayed the trust confided to him, and made use of his position to vitiate justice, and shield from condign punishment the worst of malefactors; or that there was a plot to screen the offender by withholding evidence; or that Messrs. Cameron and Dempsey conspired to defeat the ends of justice; or that from the indifference and indolence of the law officials the witnesses were not called; or that John Hillyard Cameron acted in disregard of his oath of office to perform his duties faithfully and impartially; or that he had pledged himself to help every brother Orangeman through any difficulty; or that he effectually assisted his brother Orangeman in trouble, by withholding such evidence as must have forced any jury to render a verdict of "murder;" or that he had been guilty of nefarious proceedings to which an end must be put if the public be not content to see the very fountains of justice polluted; or that John Hillyard Cameron and Dempsey had been guilty of complicity with the friends of the person indicted for murder; or that they are unjust, unscrupulous, and perjured law officers.

If the fact alone of the witnesses alluded to not having been called justified in reason the inference that all these injurious charges and allegations were true, then the defendant could have ventured to rely upon proving the one as sufficient to establish the truth of all the rest, and so might have taken upon himself at his peril to affirm that all the injurious charges and imputations built upon it were true, but he has not done so in the plea, as it was necessary he

should to make his plea what the statute requires, namely, a plea setting up as a defence "the truth of the matters charged."

We think this plea comes far short of what the statute intends in this respect, and is therefore insufficient.

As to the other part of the plea, no doubt it would be a legitimate subject for public discussion in a candid and temperate manner, whether it is or would be proper and expedient in the government to commit the conduct of public prosecutions to a prominent member of the Orange society, and its probable effect upon the due administration of justice is no doubt a matter that it may well be held to be for the public benefit should be argued and commented upon as freely as any other matter of public interest: that is, with no other reserve than the law makes necessary for the public peace, and for the protection of individuals against injurious charges upon their character for which there is no sufficient foundation in truth.

It is one thing to argue that a public officer or an individual must from his position and circumstances be inevitably exposed to the suspicion of acting from unworthy motives, and another thing to affirm that he has yielded to the supposed temptation, and has already abused the trust reposed in him. It is but reasonable that the person who takes upon him to affirm the latter, or to republish what others have stated to the same effect, should be held bound to prove the truth of such statements when he is called to account for having given publicity to them—that is, where he means to rely upon the truth as his defence; and the statute expressly enacts (in the 10th section) that without a plea asserting "the truth of the matters charged"—that is, not of a part of the libellous charges, but of the whole—the truth of the matters shall in no case be enquired into, nor whether it was for the public benefit that such matters should have been published.

Our judgment is against the defendant on the demurrer.

Judgment for the plaintiff on demurrer.

MEAGHER V. THE ÆTNA INSURANCE COMPANY.

*Insurance—Abandonment—Non-payment of premium note—Judgment of C. P.
on same pleadings conformed to.*

Declaration on a policy of insurance on a ship, alleging a total loss, and that the plaintiff abandoned the vessel to defendants, who accepted such abandonment. Pleas.—2. That the vessel ran upon a reef of rocks and was stranded, which is the loss in the declaration mentioned: that after she stranded the plaintiff should have used prompt and efficient means for her safe-guard and recovery, and repaired her when recovered, yet that he neglected to do so, and thereupon, according to the terms of the policy (which were set out in the declaration) defendants recovered and repaired her for the plaintiff, making her sound, and as good as before she was stranded, and offered to restore her to the plaintiff, on payment of his fair proportion of said repairs, but that the plaintiff refused to accept her; and that before making such repairs defendants caused a proper survey to be made according to the policy. 3. That the plaintiff did not abandon said vessel, nor did defendants accept said abandonment, as alleged. 4. That said abandonment was not sufficient to convey to and vest in the defendants an unincumbered and perfect title to said vessel. 5. That the policy contained a condition, that in case the note given for the premium should not be paid at maturity, the full amount of said premium should be considered earned, and the policy become void while said note remained unpaid: that the plaintiff gave his note for the premium, which before sixty days had elapsed after proof of the loss, &c., and before the commencement of this suit, became due, and at the commencement of this suit was and is unpaid.

Another action had been brought by this plaintiff in the Common Pleas against a different company, in which, the pleadings and terms of the policy being similar, on demurrer to the pleas, the second and fifth pleas were held bad, and the third and fourth pleas good; and this court conformed to that decision, without entering into a consideration of the questions raised.

This was an action upon a policy of insurance on the steamer Boston, belonging to the plaintiff, and averred to have been totally lost by shipwreck in the river St. Lawrence, on the 30th of July, 1859.

The averment of loss in the declaration was that while the said vessel was being employed by the plaintiff in the general freightage and passage business, and whilst navigating the said river St. Lawrence, in the canals customarily used by vessels of this class, the said vessel, when on her upward trip, from Montreal to Hamilton and St. Catherines, on the 30th of July last, was by the mere perils and dangers of the navigation aforesaid, wrecked in the river St. Lawrence, and thereby became wholly lost to the plaintiff, of all which the defendants then had due notice; and the plaintiff thereupon duly abandoned the said vessel to the said defendants, who then accepted the said abandonment.

The pleas were:—1. That the vessel in the declaration mentioned was not wholly lost to the plaintiff, as in the said declaration alleged.

2. That the said vessel while proceeding on said voyage ran upon a reef of rocks, which is the loss in the declaration mentioned, and that after the said vessel became stranded, which is the loss in the declaration mentioned, the plaintiff ought to have used prompt and efficient means for the safe-guard and recovery of the said vessel, and repaired the same when recovered; yet the plaintiff wholly neglected and refused to adopt prompt or efficient measures, or any measures, for the safe-guard or recovery of the said vessel, or repairing the same, and thereupon the said defendants did, according to the terms of the policy, (which had been set forth in the declaration,) interpose and recover the said vessel, and caused the said vessel to be got off the said rocks and taken into port, and the defendants did then cause the said vessel to be thoroughly and properly repaired, so that the said vessel was thoroughly sound, and seaworthy, and put in as good a state of repair and condition as before being stranded, for and on account of the plaintiff; and the defendants did expend large sums of money in making said repairs; and the defendants were always and still are ready and willing, and offered the plaintiff to restore the said vessel so repaired as aforesaid, upon payment by him of his fair and reasonable proportion of such repairs, but the plaintiff refused to accept the said vessel; and before the making such repairs the defendants caused a proper survey to be made, according to the terms of the said policy.

3. That the plaintiff did not duly abandon the said vessel, nor did the defendants accept the said abandonment as alleged.

4. That the said abandonment in the declaration mentioned was not efficient to convey to and vest in the said defendants an unincumbered and perfect title to the said vessel.

5. That the policy contained a condition, that in case the note given for the premium for the said policy should not be paid at maturity, the full amount of premium should be con-

sidered earned, and the said policy should become void while said note remained over-due and unpaid; and that the plaintiff did at the time of effecting the policy, give his promissory note for the sum of \$181. 25c., for the premium upon the policy, which said note afterwards, and before sixty days had elapsed after proof of such alleged loss or damage, and of the amount thereof, and proof of the interest of the insured had been made and presented at the office of the defendants, and before the commencement of this action, became due, but was not paid, and at the time of the commencement of this action still was and is over-due, and unpaid.

The plaintiff had effected an insurance in the Home Insurance Company upon the same day, on the same vessel, and having brought an action for the same loss in the court of Common Pleas, judgment has been given in that court in favour of the plaintiff for the second and fifth of the pleas, and for the defendants on the third and fourth pleas.

The terms of the two policies were the same, and the declarations and pleas in the actions in all respects similar, there being no other variations than in the amount of the sums insured and of the premium notes spoken of.

Cameron, Q. C., and *Crooks*, for the demurrer cited *Cam-mell v. Sewell*, 4 Jur. N. S. 978; S. C., 3 H. & N. 617; *Arnould on Ins.* I. 343, II. 990; *Reindel v. Schell*, 4 C. B. N. S. 97; *Case v. Davidson*, 5 M. & S. 79; *Stewart v. Greenock Marine Ins. Co.*, 2 H. L. Cas. 159, 176; *Notman v. Anchor Assurance Co.*, 4 C. B. N. S. 476; *McIver v. Henderson*, 4 M. & S. 576; *Holdsworth v. Wise*, 7 B. & C. 794; *Arnould on Ins.*, 1080, 1086; *Hutchinson v. Wright*, 4 Jur. N. S. 749; *Athenæum Life Ins. Society*, *Ex parte* the Prince of Wales Life Ins. Co., 6 Jur. N. S. 13; *Scottish Marine Ins. Co. of Glasgow v. Turner*, 1 Macqueen's Scotch Appeal Cases 334.

Anderson, contra, cited *Hatton v. Provincial Ins. Co.* 7 C. P. 555.

This court, without going into any particular consideration

of the sufficiency of the several pleas, gave judgment in favor of the plaintiff on the second and fifth pleas, and for the defendants on the third and fourth pleas, on the authority of the decision of the court of Common Pleas, remarking that it would be inconvenient and embarrassing to have conflicting judgments upon the same facts and pleadings between the same parties; and that, if the defendants desired it, they could take the opinion of a higher court in either of the cases. The different clauses of the policy on which the case depended will be found set out in the judgment given in the the Common Pleas. (a)

Judgment for plaintiff on demurrer to second and fifth pleas, and for defendants in demurrer to third and fourth pleas.

THE PROVINCIAL INSURANCE COMPANY OF CANADA V. SHAW.

Action for calls—Proof of transfer—Estoppel.

To an action brought for two calls on stock, one made on the 9th of December, 1858, and the other on the 17th of June, 1859, defendant paid into court the amount of the first call, and pleaded never indebted to the second. At the trial he admitted having held the stock, but alleged that on the 5th of February, 1858, he had transferred it to M., and he accounted for having subsequently paid the first call sued for by stating that he had given a bond to the plaintiffs to pay that call, and therefore did so notwithstanding the transfer. To prove the transfer the plaintiffs' transfer book was produced, in which it was entered, the transfer and acceptance being signed by D., who was then the plaintiffs' manager, as attorney for both parties, and their stock book was also produced, in which the stock appeared in M's. name since the 5th of February, 1858. The powers of attorney were not produced, but the plaintiffs' secretary, who produced the books, said he believed they existed, and that all the papers were in the hands of the plaintiffs' attorney. A notice to produce had been served for a previous assize, though not for this, but defendant's attorney had verbally told the attorney for the plaintiffs that he would require the same papers.

Held, that the transfer was sufficiently proved for the purposes of this action, being signed by the plaintiffs' officer, as agent for both parties, and recognised in their books; that it was unnecessary to produce the bond given by defendant; and that the defendant was not estopped by having paid the call made in December, 1858, from denying that he had transferred the stock before the call was made.

The plaintiffs sued for two calls of stock made upon the defendant, of five per cent. each, upon 375 shares held by him, being £300 on each call. The first call was made on

(g) The case in the Common Pleas has not yet been published.

the 9th of December, 1858, and the second call on the 17th of June, 1859.

The defendant paid into court £315 5s. 9d., which was accepted in full satisfaction of the first call, and he pleaded never indebted to the count for the second call.

At the trial, at Toronto, before *Hagarty, J.*, the defendant's counsel admitted that defendant had been the holder of the number of shares in respect of which the two calls were made, having originally subscribed some of the shares, and acquired others; but on the part of the defendant it was asserted that on the 5th of February, 1858, he had transferred all his stock to one Hugh McMillan, though, as he had given a bond to the plaintiffs to pay the call made in December, 1858, (*i. e.*, the first call sued for,) he afterwards paid, notwithstanding the transfer; but being no longer in fact holder of the stock after the 5th of February, he resisted the payment of the second call, which he had not specially engaged to pay, as he had the other.

To prove the transfer of all the defendant's stock to McMillan, on the 5th of February, 1858, the transfer book was produced, in which the transfer was entered. It was signed by E. T. Dartnell, as attorney for both parties: that is, the transfer by the one, and the acceptance by the other, was signed in the name of each party respectively, by him as attorney of such party. Mr. Dartnell was manager of the company at the time of the transfer.

The assistant secretary of the company, Mr. Woodhouse, produced also the stock ledger, in which the shares in question had stood in the name of McMillan since the 5th of February, 1858, and no stock had since that time stood in the stock ledger in the name of the defendant. Mr. Woodhouse swore that he believed there were powers of attorney authorising the transfer to, and acceptance by, McMillan, but that all the papers relating to this matter were in the hands of the plaintiffs' solicitors.

The attorney for the defendant was a witness upon the trial, and stated that the case being about to be tried at the previous assizes, he had served two notices to produce papers upon that trial, calling for the production of a bond from

the defendant to the plaintiffs, to pay the call sued for in the first count. He stated also, that a few days before this last trial he conversed with the plaintiffs' attorney about the papers, and about the notice to produce which had been served before the previous assizes: that he observed to him that he considered that that notice covered every thing he would require; and was told in answer that he had better be cautious: that before the previous assizes he got a copy of the bond referred to, from the plaintiffs' solicitors: that he directed a notice to produce to be served before the last assizes, but could not say whether such notice was given or not; that he paid to the plaintiffs' attorney the amount due on the first call, when the attorney admitted to him that the defendant had told him that all he owed on that bond he had paid.

Upon this evidence the learned judge directed a verdict to be entered for the defendant, and reserved leave to the plaintiffs to move to enter a verdict for them upon the second count for £312, if the court should think that on the evidence and on the record the plaintiffs were entitled to recover, observing that under the circumstances, all parties living within a hundred yards of the court house, where the trial was taking place, he thought he ought to receive secondary evidence of the bond.

Burns obtained a rule *nisi* to enter a verdict for the plaintiffs for £312, pursuant to leave reserved, or for a new trial upon the law and evidence, on the ground that the defendant was estopped by the pleadings and evidence from disputing the plaintiffs' claim under the second count; and for misdirection at the trial, in receiving secondary evidence of a transfer by defendant of his stock before the second call was made, no foundation having been first laid for receiving such evidence, the defendant not having shewn service of a notice to produce the best evidence of the transfer; and in directing the jury that there was sufficient evidence of such transfer of stock, instead of instructing them that the defendant was estopped from shewing any transfer of stock before the date of the first call, as by paying into court the

amount of that call, sued for in the first count, he was estopped from disputing that he was the owner of the same stock, referred to also in the second count, at the time of the first call sued for being made, and no evidence being given of any transfer thereof being since made, the transfer which the defendant endeavoured to prove being alleged to have been made before such first call. He cited Tay. Ev. sec. 674; Dyer v. Ashton, 1 B. & C. 3; S. C. 2 D. & R. 19; Hart v. Denny, 1 H. & N. 609; Gates v. Lord Holland, 7 E. & B. 336.

Dalton shewed cause, and cited *Twemlow v. Askey*, 3 M. & W. 495; *Kingham v. Robins*, 5 M. & W. 94; *Charles v. Branker*, 12 M. & W. 743.

ROBINSON, C. J., delivered the judgment of the court.

The plea of never indebted to the second count made it necessary for the plaintiffs to shew in the first place that the defendant held the stock in respect to which the calls sued for in that count were made, but any evidence on that head was rendered unnecessary by the defendant's counsel admitting upon the trial that the defendant had subscribed and acquired the number of shares in respect of which the call had been made. After that admission it was incumbent on the defendant to shew that he had ceased to be the owner before his call was made, and this he proceeded to do by giving evidence that he had transferred his shares. In our opinion he proved this sufficiently, in the first instance at least, by shewing in the plaintiffs' own books a transfer of the shares made by him to McMillan, on the 5th of February, 1858, signed by the plaintiffs' officer, as agent for both parties, authorised by them to effect such transfer; and when he shewed further, that their transfer was recognised by the plaintiffs as being duly made, by the fact of the transferee, McMillan, being entered in the ledger as the owner of these shares since the 5th of February, 1858, the date of the transfer. As against the company themselves in this action that was in our opinion sufficient *prima facie* evidence, whatever might have been the case if the company had set up as an answer that they had been imposed upon by a fictitious and

fraudulent transfer, contrived to evade payment of the calls. If it had been necessary for the defendant to give that evidence of the transfer which McMillan must have done, if any one were disputing his right to the shares, then he must have proved that Mr. Dartnell, the manager of the company, who in the name of the buyer and seller had signed the transfer in the company's books, had authority to act as their attorney in the matter. The defendant, it seems, had not the powers of attorney to produce on the trial, for these, we can have no doubt by the evidence, were in the possession of the plaintiffs' attorney, and the defendant had given no notice to produce them upon the present trial; that is, he had given no written notice, and since our 131st rule of court was made, which directs that all notices required by the practice of the court must be in writing, a verbal notice to produce would not be sufficient. Before that rule, it probably would have been held sufficient, as it had been in England before the courts there had adopted a similar rule. In that case what the defendant's attorney stated at the trial had passed between him and the plaintiffs' attorney ought, we think, in reason to have been held to be a sufficient call for the production of the papers which were spoken of. And besides, it seems to have been admitted that a written notice to produce was served before the assizes when this case first went to trial, and if there was such a notice given, the case of *Hope v. Beadon*, (17 Q. B. 509,) determines that a notice to produce given for the first trial would be available on the second, so that we think there is really no difficulty arising from the non-production of the powers of attorney.

With respect to the objection that the bond spoken of as having been given by the defendant for the payment of the first instalment should have been produced, the same remarks would apply. The proof of such bond formed no part of the defendant's case, except for the purpose of excluding the inference which the plaintiffs desired should be drawn, that the defendant was the holder of the shares when the second call was made upon him, because he had since the alleged transfer of his stock paid the sum due upon his first call.

The defendants' counsel, to repel that inference, accounted for his having paid the first call after he had ceased to hold the stock by affirming that he had as a share-holder given his bond to pay that particular call, and was therefore obliged to do it. That was probably an arrangement made among the shareholders at the time in order that they might have a firmer assurance of that call being paid up, and might be able to reckon upon it to meet some emergency that had occurred. The fact of the defendant having paid the first call after the time of the alleged transfer of his shares, was not conclusive proof that he then held the shares, for he might have transferred them on certain conditions, or the money with which it was paid may have been McMillan's money. The defendant was at liberty to account for it according to the fact, by stating that he paid it because he had bound himself to the plaintiffs to do so. The plaintiffs must have known whether that was true or not, and there was evidence of the plaintiffs' attorney having admitted that the defendant had paid "all that he owed upon the bond : " in other words, all but the second call.

It is contended that the fact of the defendant paying money into court upon the first count, upon a call made upon the 9th of December, 1858, estopped him from denying that he owned the stock at the time of that call being made : that it must be assumed that he then held it ; and that it was necessary for him, in resisting the payment of the call sued for in the second count, to prove that he had assigned it after December, 1858. But it cannot be held that payment of a call made in December, 1858, is an estoppel against denying that the defendant owned the same stock in June, 1859, when the second call was made. Many things may have happened in the interval to alter the position of things, and the entry of the transfer in the plaintiffs' books, though of an earlier date, and the plaintiffs' ledger exhibiting McMillan, and not the defendant, as the owner of the stock from February, 1858, to the time of the trial, was enough to rebut any mere inference that could be drawn from the payment of the first call.

In our opinion the verdict for the defendant should stand, and the rule which the plaintiff has obtained should be discharged.

Rule discharged.

During this term the following gentlemen were called to the bar:—WILLIAM DUCK, MALCOLM COLLIN CAMERON, ROBERT RUSSELL LOSCOMBE, DAVID ANDERSON CREASOR, JOHN WEBSTER HANCOCK, SAMUEL COCHRANE, JUNIOR, VERSCHOYLE CRONYN, JAMES FARQUHARSON MACLEOD, CHARLES HENDERSON SIMMS.

TRINITY TERM, 24 VICTORIA, 1860.

Present:

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.
 “ ARCHIBALD McLEAN, J.
 “ ROBERT EASTON BURNS, J.

CASE V. BURTON AND SADLEIR.

Mortgage—Construction of—Principal to fall due in default of interest after demand—Action against some only of the mortgagors—Necessity for demand on all—Plea in abatement.

Defendants, B. and S., with two others, executed a mortgage to the plaintiff to secure £4000 and interest, by which it was agreed that if default should be made in any payment of interest within one month after it should have become due “and been demanded,” then the whole principal money and such unpaid interest should immediately be payable. The plaintiff sued defendants alone upon this mortgage for the principal and interest, making no mention of the other mortgagors, and alleged in the declaration that though an instalment of interest was over due, and although payment thereof had been demanded from defendants, yet that they had not paid within one month after such demand.

Defendant B. pleaded that no demand of said interest was made, as in the declaration alleged.

Defendant S. pleaded, as to the principal sum, that he made the mortgage jointly with defendant B. and the other two mortgagors, L. and H., and that no demand of interest was made on the defendants and the said L. and H. A demand on defendants was proved, but not on the others.

Held, that the plea of defendant S. was bad, and that the plaintiff was entitled to recover, for the other mortgagors not being sued, and defendants not having pleaded in abatement, it was sufficient to prove a demand upon defendants only.

Semble, that such a covenant is not to be looked upon in a court of law as a penalty, but merely as fixing the credit to be allowed for the principal.

Held, also, that the plaintiff was entitled to succeed on the plea of defendant B., for the demand on defendants was proved, as alleged in the declaration.

COVENANT on a mortgage bearing date the 1st day of August, 1855, for the payment of £4000, with interest at the rate of six per cent. per annum, as follows, that is to say, the said sum of £4000 on or before the 1st day of August, 1876, being twenty-one years from the date of the said deed, the interest thereon to be paid quarterly in advance, the first payment of interest to be made on the day of the date

thereof, and the remaining payments of interest to be made on the 1st days of November, February, May and August, in each year, until the principal should become due; and if default should be made in the payment of any of the interest payments as therein stipulated, in manner above mentioned, for the period of one month after the same should become due, *and be demanded*, the whole of the said principal sum, together with such unpaid interest, should at once become due and payable, and the mortgagors covenanted that they would immediately after such default pay the same and every part thereof.

The plaintiff, in his declaration, after setting out the covenant as above, alleged that on the 1st day of February, 1860, the interest, or sum of £60, which in and by such covenant was then payable, became due and payable thereon, and although payment thereof was thereupon demanded in writing of and from the defendants on the 2nd day of February aforesaid, yet neither the defendants, nor either of them, nor any person or persons on their behalf, had paid the same, or any part thereof, to the plaintiff, within the time limited for payment thereof, nor within one month after the demand of payment thereof, nor had it been paid to the plaintiff since that time; and the plaintiff claimed £5000.

Pleas:—1. By the defendant Burton, that no demand for payment of the said interest was made by the plaintiff, as in the declaration alleged.

2. Defendant Sadleir pleaded an equitable plea, which was demurred to, and afterwards abandoned.

3. On the 26th of April, 1860, by leave of the court, a plea by defendant Burton was added, that the said indenture was not his deed.

4. At the same time a plea by defendant Sadleir was added, as to the principal sum of £4000 in the covenant mentioned, that he made the covenant in the declaration mentioned jointly with the said defendant G. W. Burton, one Thomas Lee, and one Edward M. Harris, and that no demand for payment of the said interest was made by the plaintiff on the said defendants and the said Thomas Lee and Edward M. Harris, as required by the said covenant.

The plaintiff took issue on the pleas of defendant Burton and demurred to the last plea of defendant Sadleir.

He replied also to that plea, that the said covenant was contained in a certain indenture of mortgage, being the deed mentioned in the declaration, made by the defendants and Edward M. Harris, and Thomas Lee, of the first part, and the said plaintiff of the second part, which covenant was then set out as stated in the declaration. The replication then alleged that the said Edward M. Harris and Thomas Lee, long before the said instalment of interest became due, assigned all their interest *in the said indenture of mortgage* to the defendants, and the defendants then assumed the payment of moneys therein mentioned, and the said Harris and Lee then left and went out of that part of the province of Canada called Upper Canada, and have remained out of Upper Canada ever since; and when such last instalment of interest fell due the same was demanded of the said defendants, in manner mentioned in the said declaration. On this replication the defendant Sadleir took issue.

At the trial, at Hamilton, before *McLean, J.*, it was proved that on the 2nd of February, 1860, a notice was given to these two defendants, signed by Robert A. Land, in these words, "I hereby demand payment of £60, interest due on the 1st of February, 1860, on a mortgage made by you and others to Horatio Nelson Case, and by Case assigned to me, on property bounded by the Great Western Railway, Wentworth Street, Burlington Bay, and Sherman's Inlet, at the eastern limits of the city of Hamilton."

The mortgage deed sued on was produced and proved, made between Thomas Lee, Edward M. Harris, and these two defendants, of the first part, their respective wives of the second part, and the plaintiff, Case, of the third part. It was a mortgage on certain real estate in the township of Barton, with a proviso to be void on payment of £4000 as stated in the declaration by the parties of the first part, their heirs, executors or administrators, or any of them.

And the parties of the first part covenanted *jointly* with the mortgagee, that they, their heirs, executors or administrators, *or some or one of them*, should and would well and truly pay, &c., at the days and times, &c.

And it was agreed between the parties "that if default shall be made in the payment of any of the interest payments, as therein stipulated to be paid, for the period of one month after the same shall have become due, *and been demanded*, then the said parties of the first part covenant and agree that the whole of such principal sum, together with such unpaid interest, shall at once become due and payable, and that they will, immediately after such default, pay the same and every part thereof."

On the 15th of January, 1857, the plaintiff, Case, by a deed annexed to the mortgage, assigned the same to Robert A. Land, on whose behalf this action was brought in the name of Case, the mortgagee.

A witness, James Cahill, Jr., was called for the plaintiff, who stated that he did not know Lee or Harris, two of the mortgagors: that he had enquired for them in Hamilton, and ascertained that Lee was residing at Montreal, but that he could not ascertain where Harris was: that he (the witness) had received three or four payments of interest from Burton and Sadleir for land since the assignment of the mortgage to him by Case: that he always had the mortgage with him when he received interest, and that Burton and Sadleir endorsed on it the amount of interest paid by them: that a demand for interest, signed by Land, was served on each of the defendants on the 2nd day of February last, as above stated, the interest having become due for one quarter, to be paid in advance on the 1st day of February; and that no demand for interest had been served on either of the other mortgagors.

Burton, one of the defendants, was called by the plaintiff, and stated that he knew Lee and Harris: that Lee had been a resident of Montreal for some years, and that Harris had left the province: that no conveyance had been made by Lee to the defendants of the mortgaged premises, and though Harris had made an assignment and got it recorded, that he had never accepted it, and that it had been made without his privity or consent.

A verdict was taken for the plaintiff and £60 damages, being the interest due on the 1st of February last, payable

in advance up to the 1st of May, with leave to the plaintiff to move to enter a verdict for the whole amount of the mortgage money and interest, if the court should think him entitled to a verdict for that amount.

Harrison obtained a rule to shew cause why the verdict should not be increased so as to cover the full amount of mortgage money and the interest, pursuant to leave reserved.

Burton and *M. C. Cameron* shewed cause, and cited *Union Bank of Weymouth v. Willis*, 8 Metcalf 504; *Willis v. Green*, 5 Hill 232; *Am. Lea. Cas. I.* 360; *Kent. Com. Vol. III.*, p. 105, Lec. 44; *Bach v. Owen*, 5 T. R. 409; *Vyse v. Wakefield*, 6 M. & W. 442.

Harrison, contra, cited *James v. Thomas*, 5 B. & Ad. 40; *Masfen v. Touchet*, 2 W. Bl. 706; *Stor. Equ. Jur. secs. 1314-1318*; *White and Tudor's Lea. Cas. II.* 471; *The People, ex rel. Dey v. The Superior Court of New York*, 19 Wend. 104; *Noyes v. Clark*, 7 Paige 179; *Cameron v. Knapp*, 7 C. P. 502; *Knapp v. Cameron*, 6 U. C. Chy. Rep. 559; *Harris v. Dunn*, 18 U. C. R. 352; *Doe dem. Lord Macartney v. Crick et al.*, 5 Esp. 196; *Doe dem. Lord Bradford v. Watkins*, 7 East 551.

ROBINSON, C. J., delivered the judgment of the court.

We do not think that the cases which were cited by the defendant, respecting non-performance of conditions precedent, are strictly applicable.

The equitable plea put in by defendant Sadleir, we were told on the argument, is abandoned by him.

The plaintiff failed on the trial in proving his replication to Sadleir's added plea, and therefore in point of form a verdict should be given for Sadleir upon the issue raised on that plea.

With respect to the defendant *Burton*, he pleaded that no demand of the interest was made by the plaintiff *as in the declaration alleged*. But the declaration alleged only a demand upon the two defendants, and such demand was proved. Therefore on that issue the plaintiff was entitled to a verdict.

Any question that there is in the case comes up properly upon the demurrer to the added plea of defendant Sadleir, which is, in substance, that he made the mortgage jointly with the other defendant, Burton, and with Lee and Harris, (which last two are not sued in this action, nor any notice taken of them in the declaration,) and that a demand of the interest alleged to be in default was not made by the plaintiff on these two defendants, and on Lee and Harris, who are not defendants.

That plea is demurred to, and the question is whether it was necessary to demand the interest from Lee and Harris, in order to give the plaintiff the benefit of the condition that on default in paying the interest after demand the whole principal sum shall become due.

The condition of the deed, as set out in the declaration, is that on default in paying interest for the period of *one month* after the same should become due, *and have been demanded*, the whole of the principal sum, together with all unpaid interest, shall become due. It is not expressed that a demand shall be made on all the mortgagors, and the question turns on what is necessary in law to constitute a sufficient demand under the circumstances.

These defendants are sued alone, and have not pleaded in abatement. They were joint contractors, the plea says, with Lee and Harris, of whom, except in this plea, there is no mention.

Then was it necessary to shew a demand on Lee and Harris, who are not sued? In our opinion it was not necessary. We can draw no distinction on account of what has been said, that these defendants were sureties only on the covenant which they executed. It binds them all equally in a court of law, and that principle applies with all its legal consequences.

This is not an equitable plea, and we are not in the situation of a court of law when applied to under the statute for relief against the penalty of a bond. The case of *Bonafous v. Rybot* (3 Burr. 1370) cannot avail the defendants as an authority in deciding the question of law upon this demurrer; nor for the same reason, we think, can the case in Chan-

cery in this province, of *Knapp v. Cameron* (6 U. C. Chy. Rep. 559.)

If Lee and Harris were defendants in this action, then the want of a demand upon them would probably have been fatal to a recovery against any, because if the plaintiff had failed against any of the joint contractors he must have failed as to all. But here a demand upon the only defendants who are sued must suffice, in our opinion, to support the action against them, for they were all bound to pay. The Con. Stats. U. C., ch. 22, sec. 72, enacts that when some only of joint contractors are sued under that act, (and there is no plea in abatement,) the joint contract or promise may be given in evidence against them, and shall have the same form and effect for the recovery of judgment thereon as if it were only the obligation or contract of the defendant or defendants actually sued.

The effect of that provision is, that the matter is to be taken at the trial as if they were the only persons bound by the contract.

It does not seem to us that it is reasonable for a court of law to look upon this as a penalty, if that could make any difference in disposing of the case. It is the contract of the parties that if the covenantors pay the interest regularly they shall have a certain credit for the principal, which otherwise shall become payable on demand, or immediately. The period of payment is thereby accelerated—nothing more. The debt is not increased, though the right to further credit is lost, so far as the legal right of the lender is concerned, whatever relief a court of equity may find itself authorised to give.

We think the plaintiff is entitled to judgment on the demurrer, and also entitled to have his rule made absolute for adding to the verdict.

BURNS V. BOYD.

Bond to convey land—Construction of—Purchase money to be paid within ten years—Right to pay within the period and claim deed—Tender of deed for execution—Want of title—Pleading.

The plaintiff declared on a bond, reciting that the defendant had agreed to sell to him certain land for £600, of which £50 was to be paid down, and the remainder "*within ten years from the date thereof*," with interest thereon half yearly; and conditioned that the defendant "on receiving the said principal money and interest at the days and times, and in manner thereinbefore mentioned for payment thereof," should "sign, seal, deliver, and execute" unto the plaintiff, a good, valid, and sufficient deed in fee simple of said land, and so convey the same to him free from all incumbrances. The breach assigned was, that although the plaintiff had paid the £50, and had also paid £250 on account of interest, and was at all times ready and willing, and offered to pay to defendant the balance of principal and interest, on receiving from him such deed, yet that defendant did not, could not, and would not give him said deed, and could not then nor ever could convey or give any title to said land.

Held, on demurrer, that the declaration was bad, for 1. The condition being to convey on receiving the purchase money *within ten years*, the defendant could not be compelled to convey before the last day of that time, or at least not without notice of the intention to pay at an earlier day, and a tender accordingly, which was not averred. 2. The offer alleged was only to pay on receiving a deed, and defendant was entitled first to receive the money. 3. The plaintiff was bound to tender a deed for execution, and was not relieved by the general allegations in the declaration, that he could not give a good title, &c.

DECLARATION.—For that whereas the defendant, on the 3rd of October, 1854, by his bond acknowledged himself to be held and firmly bound to the plaintiff in the sum of £1,200, subject to a condition, whereby—after reciting that whereas the said plaintiff had contracted and agreed with the above bounden defendant for the purchase of a certain tract of land, &c., (describing it,) containing six acres, at and for the price or sum of £600, the sum of £50 to be paid on the execution of the said presents, and the remaining sum of £550 to be paid by the said plaintiff, his heirs, executors, administrators, or assigns, within ten years from the date thereof, with interest thereon half-yearly, after the rate of six per cent. per annum, payable in the mean time on the third days of April and October in each and every year, the first of such payment of interest to be made on the third day of April then next ensuing—the condition of said writing obligatory was and is declared to be such, that if the above bounden defendant, his heirs, executors, administrators, or assigns, should and would, upon receiving the said principal

money and interest at the days and times, and in the manner thereinbefore mentioned for payment thereof, sign, seal, deliver, and execute unto the said plaintiff, his heirs and assigns, a good, valid, and sufficient deed in fee simple, free from all incumbrances, of the land and premises thereinbefore mentioned, and so convey the same to him free from all incumbrances, then said presents should be null and void, otherwise they were to remain in full force and virtue.

And for assigning a breach of the said condition of the said writing obligatory, the plaintiff saith, that although he hath in all things well and truly performed and fulfilled his said recited bond, and hath paid to the said defendant the said sum of £50, parcel of the said purchase money, and likewise the further sum of £250, for and on account of the said interest on the said balance of the said purchase money so to be paid by him as aforesaid; and was at all times before the commencement of this suit ready and willing, and offered to pay to the said defendant the balance or residue of said principal sum or price of said land, and any interest due thereon, upon receiving from the defendant such good, valid, and sufficient deed, in fee simple of and for said land, and premises, free from all incumbrances, yet the defendant did not, could not, and would not, give to said plaintiff such deed in fee simple of said land and premises, free from all incumbrances, or convey to the plaintiff said land and premises, free from all incumbrances; but, on the contrary, the plaintiff saith that the defendant could not then, nor ever could convey or give any title whatever to said land and premises, and never had any, although at the time of said purchase he represented to the plaintiff that he was the owner in fee simple free from all incumbrances of said land and premises; and never can give the plaintiff any such deed, or any such title as he was so bound to give to the plaintiff, whereby the plaintiff has not only lost said land and premises, and any title he had thereto, but also the sums of money so paid to said defendant on account of said purchase money and interest, and which the defendant has always and still neglects and refuses to refund and pay to the plaintiff, and which is still wholly due and unpaid to him, whereby the

said writing obligatory became forfeited, and whereby an action hath accrued to the plaintiff to demand of the defendant the said sum of £1,200.

Common counts were added, for money lent, money paid, laid out and expended, and on account stated.

The defendant pleaded never indebted to these counts; and demurred to the first count, assigning as grounds of demurrer, that the said declaration does not show that the condition of the said bond was broken, inasmuch as it not alleged that the plaintiff ever paid the said purchase money to the defendant. That it is not alleged that the plaintiff ever tendered to the defendant for execution by him, or by any other person or persons, any deed or conveyance of the said land, or ever demanded the same.

C. S. Patterson, for the demurrer, cited *Dart on Vendors*, 617, 618; *Sibthorp v. Brunel*, 3 Ex. 826; *Yates v. Gardiner*, 20 L. J. Ex. 829; *Thompson v. Brunskill*, 7 U. C. Chy. Rep. 542; *Baggalley v. Petit*, 5 Jur. N. S. 868.

Burns, contra, cited *Nicolls v. Madill*, 6 U. C. R. 415; *Sug. V. & P.* 216, 419; *Mouck v. Stuart*, 4 U. C. R. 203; *Prindle v. McCan*, *Ib.* 228; *McDonald v. Snitsinger*, 5 U. C. R. 312; *Rogers v. Lake*, 9 U. C. R. 264.

ROBINSON, C. J., delivered the judgment of the court.

The defendant has demurred to the count upon the bond, and pleaded the general issue to the other counts. The only question therefore that can be determined upon the demurrer is whether the count upon the bond sets out in substance a good cause of action; and it must be borne in mind that those cases are not applicable, of which there are many in the books, which turn upon the question whether the vendee was or was not under the circumstances entitled to treat the agreement for the sale of land to him as rescinded, and to sue for the purchase money back under a common count for money had and received.

Then, confining ourselves, as we must, to the count demurred to, it is a peculiarity in this case that the defendant (the vendee) according to the recital in the bond, was not to

pay the money on any particular day, but *within* ten years from the date, so that the defendant had no means of compelling the payment of the purchase money before the 3rd of October, 1864. The plaintiff nevertheless assumes that he was at liberty to come with the purchase money on any day that he chose, within the ten years, and could then demand his deed on paying or tendering the principal and interest:—that he might have done this, for instance, in 1855 as well as in 1864. If this be so, then the defendant was bound to hold himself in constant readiness to make a good title free from incumbrances from the day that he executed the bond. This may have been intended and understood by the parties, and it may be the legal effect of the bond and condition as set out, but we doubt it. If there had been any such words as that the plaintiff might pay on *any day* or at *any time* within ten years, we should have no doubt; but a condition to pay “*within* ten years from the 3rd of October, 1854,” is the same, we think, as a condition to pay *on or before* the 3rd of October, 1864, which is a common form of undertaking; and upon an obligation in that form we take it that the party who is to pay may no doubt acquit himself by a payment made before the day which the other accepts, and it may be the same if the obligor meets the obligee before the last day named, and tenders him the money; the same thing, we mean, in its effect as to saving the party tendering from any disadvantage. But whether payment or tendering the money in such a case before the last day named will give a collateral advantage to the party paying, so as in this case to enable the defendant to insist upon receiving his title at once, though it may be the next day or a week after the bond was executed, is what we doubt.

In Comyn's Digest, “Condition,” G. 7, it is laid down that payment before the day will not give a collateral advantage. In *Hawley v. Simpson* (Cro. Eliz. 14) the condition was to pay at a certain place at or before the 29th of September, and it was held by the court “that if the obligor tender the money on the 28th day of September, at the place, and the obligee is not there to receive it, it is a void tender, *for the tender is to be the last day*; but if the obli-

gor meet the obligee at a place before the day, and he then tender it, this is sufficient, and the obligee ought to receive it."

In *Harman v. Owden* (Lord Raym. 621) the defendant had promised to deliver to the plaintiff at or before the 8th of January, certain goods out of a ship into a barge, to be brought there by the plaintiff for the said purpose. The plaintiff averred that on the 8th of January he brought there his barge, and the defendant did not deliver his goods. It was objected that he ought to have averred that the defendant did not deliver them before, as that would have been a compliance with his undertaking. The court held it to be no objection after verdict, and Lord Holt held that it would have been no objection before, for that, "though the defendant had his election to deliver before, &c., yet there ought to be a concurrence of the plaintiff, and he ought to be ready to accept them, *for the defendant cannot make a tender before the last day to oblige the plaintiff to accept them*, and if he comes before the last day to make a tender, that will not excuse him from making a tender or delivery of the goods upon the last day."

If, as we stated before, the condition in this case was to the effect that the plaintiff might pay the money at any time that he pleased within ten years, and that at whatever time he did pay it, the defendant should make him a good title, &c., then, upon giving reasonable notice to the defendant of his intention to pay at any certain day within the ten years, if the plaintiff paid the money on such day, and the defendant accepted it, we should think it would follow as a consequence that the defendant would be bound, on receiving such payment, to make a good title, and also that he would be bound to convey if the plaintiff attended after such notice and tendered the money, and the defendant refused to accept it. But upon an undertaking like this, to pay *within ten years*, which we take to be the same as an undertaking to pay at or before the expiration of ten years, or rather to pay before the expiration of ten years, we incline to the opinion that the vendor who is to make the title could not be compelled to convey before the last day named, and certainly

not without notice given to him of the intention to pay or tender at a certain day within the day named. The point may be one of much importance in any such case to the vendor, for when he has entered into a bond to convey upon receiving the money, and when the money has been made payable at or before a certain day named, the vendee, as would seem from the case we have cited from Lord Raymond, of *Harman v. Owden*, is entitled to look to the last day named as that on which alone it is incumbent on him to be prepared to carry into effect his part of the agreement. In this case, for instance, the fact may have been that the estate was on lease when the bond was made, for a term which would expire long before the end of the ten years, the only certain day named, or it may have been subject to a mortgage, which would fall due in a short time after he made the bond, and which he may have known that he could easily discharge at the day; and in either case, if the vendee should come with his money in a few days after the date of the bond, he would not be in a condition to make a good title free from incumbrances. So, also, the vendor in such a case may not have owned the land at the time of making the bond, but may have contracted for it, and been well assured that he would be in a condition to make a title when the day named should arrive, as in this case at the end of ten years; and the fact of the plaintiff having to pay him the price before he could call for a deed, might have made it safe for him to enter into the contract.

The argument on the other side is, of course, that as the plaintiff engaged to pay the price *within ten years*, he was as much at liberty to pay at any time within that period as on the last hour of the ninth year: that being so at liberty to pay, the defendant was bound to receive the price whenever it was tendered; and that, whether he accepted or refused to accept, the same obligation would rest upon him whenever the tender or payment might be made as if it was paid just before the end of the time limited. We think that consequence would not follow a tender made at any time after the date of the bond, and certainly not without its appearing that notice of the intention to make the tender of

the money was given, and that the tender was made to the vendor according to the notice, and that he refused to accept it. Whether upon the facts stated on this record the obligation to make the title would at once attach, is what, upon consideration of the case of Harman v. Owden, we still consider doubtful. The condition of the bond now sued upon, is not merely that upon receiving the principal money and interest the defendant should execute a deed, but that he should do so upon receiving it, with the interest, "*at the days and times, and in the manner therein mentioned for payment thereof,*" and the only day or time mentioned is *within ten years from the date*, paying interest half-yearly in the meantime.

That the plaintiff had a right to pay the money at any time within the ten years, it appears to us must be admitted, but it does not follow that his tendering it some years before it was payable, and without any averment of notice beforehand that he intended then to pay it, is equivalent to actual payment, especially when the allegation is that he offered to pay "*on receiving from the defendant* a good and valid deed," &c., whereas the condition is that the defendant would execute a deed "*on receiving the money.*" The plaintiff, in assigning the breach as he has done, has reversed the order in which the two things were to be done, and rests his case upon his right to receive the deed before he paid the money, though the condition was that the defendant should execute the deed upon receiving the money. The tender with such a condition annexed to it could be no legal tender, and besides the plaintiff does not allege any actual tender of the money to the defendant on any particular occasion. For all that appears, he may mean nothing more than that he wrote to the defendant *offering* to pay the money *on receiving* the deed, and to such an offer the defendant might well reply that he was not bound by the bond to execute the deed and deliver it before he had received the price.

There is no averment that the defendant refused to receive the money, or had a chance of doing so, but only "that he did not, could not, and would not give to the plaintiff a deed in fee simple, and could not then nor ever could

convey a good or any title to the land, and never had any title to it."

There are certain allegations in this count which would more regularly find a place in a declaration for a deceitful and false representation of title, or in an action of assumpsit to recover back the money paid as being paid upon a consideration that had wholly failed, but these averments cannot help in this action upon the bond, which must depend upon the sufficiency of the breach assigned to entitle the party to judgment for a forfeiture of the bond.

Upon the other objection to the declaration—namely, that the plaintiff should have averred that he had paid or tendered the money, and *tendered a deed* to be executed—the defendant in our opinion was entitled to succeed. This is not like the case of *Baker v. Bulstrode*, (1 Mod. 104; 1 Ventr. 255; Raym. 232; 2 Lev. 95,) where the condition was that the defendant should "seal and execute" a release of all demands to the plaintiff, and in which the court held that the word *execute* or the word *seal*, comprehended the making. The condition here refers to the execution of a conveyance of real estate, and the principle applies that it rests with the purchaser to prepare the conveyance, which principle will govern in determining who is to do the first act, unless there is something in the agreement or condition which shews the intention to have been otherwise, and thus overrules the principle. Thus, where the vendor binds himself *to convey* or to make a good title on a certain day, or on a certain event happening, then he must at his peril prepare and make the deed, for he cannot otherwise fulfil his undertaking to *convey* or to *make a title*. In this case what the defendant bound himself to do was, that *upon receiving the price* agreed upon, and interest, at the *days and times, and in the manner thereinbefore mentioned for payment thereof*, he would sign, seal, deliver, and execute a good, valid, and sufficient deed, in fee simple, free from all incumbrances.

The cases in this court of *Mouck v. Stuart*, (4 U. C. R. 203,) *Prindle v. McCan*, (Ib. 228,) and *McDonald v. Snitsinger*, (5 U. C. R. 312,) were decided upon the distinction we have mentioned, and we should hesitate to go against those

decisions, even if they were not so clearly supported by later authorities as they appear to be. We refer to Sugden on Vendors and Purchasers, 10th Ed. I. p. 374,-376; Poole v. Hill, (6 M. & W. 841,) and Stephens v. DeMedina, (4 Q. B. 422.)

It has been argued that the plaintiff was relieved from the necessity of tendering the deed by what is asserted in the declaration, namely, that the defendant *could* not give to the plaintiff a deed in fee simple free from all incumbrances; that he could not then, (that is, when the plaintiff offered to pay the money on receiving a deed,) nor *ever could* convey or give any title whatever to the land and premises, *and never had any title,*" &c. General allegations of that kind do not, we think, bring this case, of an action on a bond with condition to make title upon receiving the purchase money, within the principle stated by Mr. Sugden, (Sug. V. & P. I. 377,) that "although a purchaser is expressly required to prepare a conveyance, yet if a bad title be produced he may maintain an action for recovery of his deposit without tendering a conveyance. So where a vendor has, by selling the estate, incapacitated himself from executing a conveyance to the first purchaser, that renders further expense and trouble on his part unnecessary, and he may accordingly sustain an action without tendering a conveyance or the purchase money."

If the plaintiff were bringing an action on the case for the deposit, such cases as Knight v. Crockford, (1 Esp. 100,) Jackson v. Jacob, (3 Bing. N. C. 869,) and Jones v. Barkley, (Doug. 659,) would apply; but the plaintiff here is under the necessity of shewing his right to judgment for the penalty of his bond, and we do not think that what he has set forth in his declaration entitles him to it, for he could not call for a deed, till the defendant had "received the principal money and interest," and if the defendant could then make him a good deed it would signify nothing that he had never before had it in his power to do so. If by the terms of this condition the plaintiff was not entitled to call for a deed till he had paid the purchase money, as we think he was not, then before he can recover upon the bond for not executing a deed, he must shew that he has paid the money, or that he had actually

tendered it, and the defendant refused to accept it. His right to rescind the contract, and sue for his deposit money, on his being able to shew that the defendant was unable to make a title, is another matter.

Judgment for defendant on demurrer.

O'LEARY AND THE TRUSTEES OF SCHOOL SECTION NUMBER TWO, IN THE TOWNSHIP OF BLANDFORD.

School trustees and teacher—Arbitration—Mandamus.

The court refused a mandamus to compel school trustees to pay a sum awarded to be due to a teacher for arrears of salary, observing that under the statute the arbitrators could levy the sum by warrant, which was *prima facie* the proper course, or that the municipality could collect it by rate if requested.

Upon the facts also, which are stated below, the legality of the award appeared doubtful.

D. G. Miller obtained a rule *nisi* on the trustees to shew cause why a mandamus should not issue, commanding them to pay to the applicant, Partrick O'Leary, late teacher of the common school in the school section, \$114.93, being arrears of salary awarded to be due to him by an award made on the 26th of July, 1859; or commanding them to exercise the corporate powers vested in them as trustees, necessary for the fulfilment by them of the agreement entered into by the trustees for payment of the salary of the said O'Leary.

It appeared that on the 22nd of July, 1859, O'Leary served a written notice on the trustees (who then were William Hewitt, Richard Robinson, and Michael Overholt,) stating that a difference had arisen between him and them in regard to the payment of his salary as teacher of the school section for nine months, ending on the 30th of September, 1858: that he had appointed an arbitrator; and called on them to do the same within three days of the service of the notice. He gave the name of his arbitrator, William Grey.

On the 26th of July, 1859, an award was made by three arbitrators, the local superintendent being one of them, and the others being the said William Grey, and another arbitrator, Gabriel Gurnett, who had been appointed also by O'Leary, the trustees having omitted to make any appointment. The

award was, that there was then due from the trustees to O'Leary \$114.93 for his services as teacher, which the arbitrators directed should be paid to him within one month, at a place named, and also \$28.93 for his costs and expenses about the arbitration and award.

On the 27th of July one of the arbitrators gave to the trustees a written notice of the award.

Beard shewed cause, citing *Gladwin v. Chilcote*, 9 Dowl. 550; *Orr v. Ranney et al.*, 12 U. C. R. 377; *Consol. Stats. U. C.*, ch. 64, secs. 84, 86.

The cause shewn upon the affidavits was, that the agreement with the teacher was made by Robinson, one of the present trustees, and by Edmondstone and Hayward, who were then, or claimed to be, trustees since the 1st of January, 1858: that the inhabitants of the school section were greatly dissatisfied with the appointment of the teacher, and in March, 1858, the school trustees entered into resolutions intended to supersede what had been done in January preceding; and that thenceforth the three persons who as trustees had entered into the agreement with O'Leary were looked upon as personally responsible to O'Leary, and not that the trustees were responsible: that O'Leary was present at the meeting in March, and was aware of the proceedings that took place: that all payments made to O'Leary were made by Richard Robinson, one of the trustees, who it was alleged by the other trustees was in collusion with him: that the notice of proposed arbitration and of the appointment of an arbitrator by O'Leary, was served on Overholt, one of the trustees, and in consequence of some oversight the trustees omitted to appoint an arbitrator in due time: that neither Overholt nor Hewitt, who at that time were trustees with Richard Robinson, had any further notice or knowledge of the proceedings at the arbitration till after the award was made. Overholt swore that "he had no notice or knowledge that O'Leary had appointed an arbitrator for the trustees, nor of the meeting or intended meeting of the arbitrators, and was not present at the meeting, nor any one for him; that he

adduced no evidence before the arbitrators; and that all proceedings from the time of service of the notice (on the 26th of July) were wholly *ex parte*; that if Robinson had any notice he never communicated it to the other trustees and that if he attended the arbitration it was without the knowledge of Overholt, and in order to give the appearance of regularity to the proceedings, when he was aware of the objections which his co-trustees had to the proceedings, and knew that they held him, Robinson, to be personally liable to O'Leary, as well as responsible for money which he had collected, and that the said other co-trustees intended to resist the claim: that Robinson and O'Leary, as he, Overholt, was advised and believed, acted in concert in the matter, and with the view of protecting Robinson; and that the two other trustees now resisted the claim of O'Leary, as they would have done before the arbitration if they had an opportunity of doing so.

Hewitt, another of the trustees, corroborated Overholt's affidavit. He swore that the notice to appoint an arbitrator was served on him, but through an oversight they omitted to appoint one in time: that he had no knowledge of the proceedings before the arbitrators, nor of the meeting, and was not present thereat, nor any one on his behalf: that he adduced no evidence, and that the proceedings were wholly *ex parte*; and he swore, in the same terms as Overholt, to his belief of collusion between Robinson and O'Leary.

ROBINSON, C. J., delivered the judgment of the court.

We think there are several sufficient reasons against granting a mandamus in this case.

The 86th section of the Common School Act, Consol. Stats. U. C., ch. 64, provides that the arbitrators may levy by warrant the sum which they have awarded, and that is *prima facie* the proper course to be taken.

Then it is clear that the arbitrators had no authority to award costs as they have done; and that if it is right that the amount awarded should be paid by raising a rate, the municipality can do it if they are requested.

And, in addition to this, the case appears so doubtful upon

the merits, we mean as to the legality of the award, that it is not fit that we should use this proceeding for enforcing it, while other means are open.

We discharge the rule, but not with costs.

Rule discharged.

SISSON V. WILLIAM ELLIS, AND MARY ELIZA ANNE
ELLIS, HIS WIFE.

*Will—Construction—Estate tail or for life—Conveyance by tenant in tail—9
Vic., ch. 11.*

Testator, after devising certain land to his wife for life, provided that at her death the said land, together with the residue of his real estate, should be equally divided between his two daughters, to hold the same during their natural lives, and after the death of either her share to be equally divided between her children, share and share alike, as soon as they should attain the age of 21 or should marry, and in case either should die without leaving legal issue, then her share to be equally divided among the testator's brothers, &c. He died in 1832, leaving these two daughters, his only children.

Held, that the widow took no interest in the residue: that the daughters took an estate tail therein; and that under 9 Vic., ch. 11, either of them could convey a fee simple in her share.

The plaintiff sued upon a covenant contained in a deed to the plaintiff from the defendants, of certain land in the town of Prescott, by which defendants covenanted that they were at the time of the ensealing and delivery of the said deed, solely, rightfully, and lawfully seised of a good, sure, perfect, absolute, and indefeasible estate of inheritance in fee simple in the said land; and the breach assigned was that the defendants were not, nor was either of them, seised of an estate in fee simple in the said lands, but only had an estate for life therein.

Defendants pleaded that they, at the time of the ensealing and delivery of the deed mentioned, were justly seised of an estate in fee simple in the said lands.

By consent of the parties, and by order of a judge, a special case was stated, in which the following facts were agreed to:—

Edward Jessup, in his lifetime, of the town of Prescott, in the county of Grenville, was seised of the premises in ques-

tion in fee simple, with other real estate of great value in that town and county. On the 22nd of September, 1830, he made his will, of which a copy was annexed, and of which the material parts are given below :—

The testator died in 1832. At his death he left his wife and the two daughters, named in the will, surviving him, and no other daughters or children. The daughters were then infants.

In 1832 the widow proved the will, and administered to the estate. In 1856, Mary Eliza Anne Jessup, one of the defendants, and one of the children named in the will, being of full age, with her mother's consent, married the defendant, William Ellis. In October, 1859, the defendant, Mary Eliza Anne Ellis gave birth to a male child, which was born alive, but died some hours after its birth.

The property mentioned in the declaration and deed, was a portion of the property not covered by the devise to the widow of Edward Jessup, and was part of a valuable block situate in the town of Prescott.

The plaintiff purchased from the defendants the aforesaid piece of land, and *they* procured from Sophia Matilda Georgiana Jessup named in the will, a conveyance in fee simple of the premises in question, which deed was admitted and put in as part of this case.

The defendants, on the 1st of November, 1859, made the deed declared upon (also put in). The plaintiff finding how the will stood, desired to throw up the purchase, which was refused, and he therefore brought this action.

The brothers of Edward Jessup, named in his said will, were still alive, and had lawful issue living; the widow of said testator was also still alive.

The questions submitted were :

Had the defendants, or either of them, at the date of the deed to the plaintiff, an estate of inheritance in fee simple in the lands in question, such as is described in the covenants in the deed from them to the plaintiff?

Does the plaintiff, under the deed in question, take, or is it in the power of defendants to make, a title to the estate in question in fee simple?

There was no specific devise of the land in question. It formed part of the residuary real estate of the testator, which was devised as follows :

After devising certain real estate to his wife, Elizabeth Rebecca, to hold for her life, the will ran thus :

“ And at her death the said property, together with the residue of my real estate in the district of Johnstown, to be equally divided between my two daughters, Mary Eliza Ann Jessup, and Sophia Matilda Georgina Jessup, whom I wish to have and to hold the same during their natural lives, and after the death of either of them her share to be equally divided between her children, share and share alike, in quantity, quality and value, as soon as they shall attain the age of twenty-one years, or shall marry, provided such marriage takes place by and with the consent of their mother ; and in case either or both of my said daughters shall die without leaving legal issue, then I wish her or their shares to be divided equally among my said brothers, James Jessup, Hamilton Dibble Jessup, and Joseph Jessup, sharing and to share alike, &c., and on the demise of either of my said brothers without leaving legal issue, then his proportion of the said estate to be equally divided among the surviving brothers and their heirs for ever ; but if either of my said brothers shall die leaving legal issue, then his said share to be equally divided among his children, sharing as aforesaid.

Wallbridge, Q. C., for the plaintiff, cited *Lill v. Lill*, 23 Beav. 446 ; *Key v. Key*, 4 DeG. McN. & G. 73 ; *Pride v. Fooks*, 4 Jur. N. S. 678 ; *Jarm. on Wills*, 336 ; *Feakes v. Standley*, 24 Beav. 485.

Eccles Q. C., for the defendants, cited *Doe Annandale v. Brazier*, 5 B. & Al. 64 ; *Cook v. Gerrard*, 1 Saund. 181 ; *Rex v. Inhabitants of Ringstead*, 9 B. & C. 218 ; *Doe Todd v. Duesbury*, 8 M. & W. 514 ; *Doe Bean v. Halley*, 8 T. R. 5 ; *Voller v. Carter*, 28 Eng. Rep. 267 ; *Cole v. Goble*, 20 Eng. Rep. 234 ; *Kavanagh v. Morland*, 23 Eng. Rep. 582 ; *Bamford v. Chadwick*, 26 Eng. Rep. 302 ; *Butt v. Thomas* 36 Eng. Rep. 571 ; *Machell v. Weeding*, 8 Sim. 4 ; *Doe*

Forsyth v. Quackenbush, 10 U. C. R., 148; Jarm on Wills, I. 223.

ROBINSON, C. J.—It is to be observed that the land conveyed by the defendants to the plaintiff is a small tract in the town of Prescott, described by metes and bounds. It is not merely an undivided moiety in the land that is conveyed, but the deed appears to convey the whole estate, though there is no evidence of a partition between the testator's two daughters, and without partition or a release from the other daughter the defendant Mrs. Ellis could only have an undivided moiety in that land, and could not make title to any especial portion of it, and still less to the whole. The statement in the case as to a conveyance from her sister Sophia M. G. Jessup is obscure, and I shall therefore only consider whether the defendants could make a title to the plaintiff in fee simple of an undivided moiety of the estate.

I think it clear, in the first place, that the widow took no life estate by implication in this land. The terms of the residuary devise shew that not to have been intended. It contemplates the estate vesting in the testator's grand-children, in case of the death of either of the mothers while the testator's widow may be still living, for it directs that the grand-children (that is, the children of either of the testator's daughters who may die) shall have the share of the deceased mother on their attaining the age of twenty-one years, which might well happen while the testator's widow is still living. This shews that the testator did not intend that his widow should take the residue of his real estate for life, or indeed any interest in it, though a grammatical construction may seem to give that effect to the words of the devise, but not perhaps necessarily, even if there had not been any thing in the will such as I have mentioned, and which gives evidence I think of a contrary intention, and so distinguishes this case from that cited, of *Rex v. The Inhabitants of Ringstead* (9 B. & C. 218.)

What is said in the will of the estate of either of his daughters who may die vesting in the children whom they may have, upon the marriage of such children, (that is, be-

fore attaining 21,) provided they marry with the consent of their mother, is a blunder, for according to the terms of the devise the mother could not be then living to give her consent.

If, then, the mother took no interest under the will in the residuary estate, as I think it clear she did not, did or did not the testator's two daughters take under the will an interest immediately upon the testator's death, or was their interest an estate to commence *in futuro*, by way of executory devise, as in the case of the will which was before the court of King's Bench in England in *Rex v. The Inhabitants of Ringstead*, which I have just referred to?

The daughters to whom the devise is made in the will before us were the heirs-at-law of the testator, the same persons to whom the estate would go if the widow took no interest in it under the will, and if no immediate estate in it was given by the will to any one else. I think, therefore, we are driven to the conclusion, that as the widow took no interest, the testator could not have meant that his daughters were not to take their interest under the will during the widow's lifetime, for they would clearly take as co-heiresses if they took no estate at once under the will. There is no difficulty in this case about not disinheriting the heir without a clear intention to that effect appearing in the will, for the heirs are the persons who would take under the will; and, besides, the same reason that appears to shew that it was not meant that the mother should take a life estate in the residuary estates by implication, appears also to shew that the vesting of the estate under the devise was not to wait the death of the widow, for then it might not vest on the marriage or coming of age of the children of either of the testator's daughters who might die leaving issue, as the testator clearly intended it should do.

We must read the devise, I think, thus, "I devise certain real property specified to my wife, during her natural life, or widowhood, and after her death, &c., the same to form part of the rest and residue of my real estate; and all the said residue of my real estate I hereby devise to my two daughters," &c.

Admitting, then, the daughters to have taken an immediate interest on the death of their father, what estate in the residue does the will devise to them? They took in my opinion an estate in fee tail, with the remainder over of the estate of either of them who might die leaving no lawful issue to the testator's three brothers as tenants in common, whether in fee or for life it is not material in this case to determine.

This is the answer which must be given, I think, to the first question put to us; and as to the second question, namely, "Does the plaintiff under the deed in question take, or was it in the power of the defendants to make, a title in fee simple?" for the reason which I have already stated, we can only give an opinion as to the right of the defendants to convey an interest in the undivided moiety given to Mary Eliza Anne Jessup by her father's will. Being a tenant in tail of that undivided moiety, she could, by a deed executed jointly with her husband, convey an estate in fee simple in that moiety, under the power given by statute 9 Vic., ch. 11, now standing as ch. 83 of the Consolidated Statutes of U. C., which provides for the abolition of fines and recoveries, and for the substitution of a more simple mode of assurance of estates tail. (a)

I see nothing to prevent either or both of the devisees from conveying in fee simple, under the fourth clause of the act, by a deed made and registered as the act directs; and I see no reason why the deed that has been made, registered, as it was, within six months, and having a proper certificate of examination of the married woman endorsed, should not be held to have passed a fee simple in the undivided moiety to the plaintiff. The husband having joined in alienating, has conveyed his interest as tenant by the courtesy.

That the daughters of the testator took an estate tail by the will, is, I think, plain upon the following cases:—*Robinson v. Robinson*, (1 Burr. 38, 52,) *Doe dem. Candler v. Smith*, (7 T. R. 531,) *Doe dem. Cock v. Cooper*, (1 East 229,) *Frank v. Stovin*, (3 East 548,) *Doe dem. Cole v. Goldsmith*, (7 Taunt. 209,) *Bennet v. Lord Tankerville*, (19 Ves. 170,) *Jesson v. Wright*, (2 Bligh 1,) *Roe dem. Dodson v. Grew*,

(a) See secs. 4, 30, 31, 43.

(2 Wils. 323,) and Doe dem. Blandford and Dymock v. Applin, (4 T. R. 82.)

In Doe dem. Cock v. Cooper, the will was in terms undistinguishable in their effect, I think, from the present will, or indeed, if there be any difference, the intention to give an estate to the first taker *for life* was more plain than in the case before us, for the devise was to R. C., for "the term only of his natural life;" whereas the devise to the daughters in this case is "to hold during their natural lives," without the word "only," which was used in the other case; yet in that case it was held that R. C. took an estate tail, notwithstanding the particular intent, so plainly expressed, that he should take only for life, and for the reasons stated shortly by Mr. Justice *Grose* in that case, that it was necessary to determine what upon the whole of the will appeared to have been the intent of the testator, and this he said had been truly stated to be "that R. C. should first take the estate, and after him *his children*, and that the remainder over should not take effect so long as any of his descendants remained. Then this general intent can only be carried into effect by giving the first taker an estate tail."

Now in that case the general intent was no plainer than in this. It was inferred only from the use of the very words that occurred in the will before us, namely, that if the daughters should die *without leaving lawful issue*, then the estate was to go over to the testator's brothers. And the general intent being plain, that the estate shall not go over to the brothers so long as any of the testator's descendants remain, that intent shall prevail over the particular intent, which no doubt is quite plainly expressed in the will, that his daughters should have only an estate for life, the two intentions being inconsistent with each other, as explained in the cases I have cited, particularly in *Robinson v. Robinson*, (1 Burr. 38). And to prevent the general intent from being defeated, the courts in such cases by construction enlarge the estate for life given to the first taker to an estate tail.

If we should hold that the two daughters took a life estate as tenants in common, and nothing more, with remainder to their children, and in case either should die without leaving

children, then the estate to go to the testator's brothers, then the intention of the testator would be defeated, which is manifest in the will when taken altogether, namely, that while any descendants of his were living the estate should not go to his brothers; and to prevent this the courts have established the rule of construction which I have mentioned, though it is plainly repugnant to the wording of the will, which devises to the daughters expressly an estate for life, and though it is true that nothing is easier than to defeat the general intent in this case, after all, by the daughters conveying the estate in fee simple to a purchaser under the provisions of the late act for abolishing fines and recoveries, and substituting a more convenient mode of assurance of estates tail.

Looking at the terms in which this case is submitted to us, though our opinion is substantially in favour of the defendants as to the effect of the will, and will be so regarded by the parties, yet in form our judgment must be given for the plaintiff, for we cannot say that the defendants had an estate in fee simple in the land or any portion of it when they made their deed to the plaintiff, nor can we say that the plaintiff took under that deed an estate in fee simple in the particular land in question, for Mrs. Ellis had but an undivided moiety in the whole property, not the entire interest in any separate portion of it.

McLEAN, J.—The late Edward Jessup by his last will and testament devised to his widow certain property, to hold during her natural life or widowhood, and the will provides that at her death the said property, together with the residue of his real estate in the district of Johnstown, shall be equally divided between his two daughters, Mary Eliza Anne Jessup, and Sophia Matilda Georgina Jessup, to have and to hold the same during their natural lives, and after the death of either of them her share to be equally divided between her children, to share alike in quantity, quality and value, as soon as they shall attain the age of twenty-one years, or shall marry; and in case either or both of his said daughters should die without leaving lawful issue, then her or their shares to be equally divided amongst his brothers, James

Jessup, Hamilton Dibble Jessup, and Henry Joseph Jessup, sharing alike in quantity, quality and value, &c. From the manner in which the devise to the daughters is expressed, it might be supposed that the intention of the testator was that they should not take any interest in the estate during the lifetime or widowhood of their mother ; but it is evident that such could not have been the case, because he provides that the share of either of them shall be equally divided amongst her children upon her death, or in case of dying without issue how it shall be otherwise disposed of, and he could not have intended that the children of either of the daughters who might die, or other party interested, should only take an interest on the death of his widow. The children of a deceased daughter are to take on coming of age or on being married, and either of these events might occur during the lifetime of the widow. The intention must have been that any portion of the estate in the district of Johnstown, not devised to the widow for life, should immediately pass to the daughters under the will, and that the portion of the widow should in like manner pass on her death, or ceasing to be the widow of the testator ; and it is quite evident that as long as any issue remains of either of the daughters, the share of such daughter shall go to all her children on arriving at the age of twenty-one years, or being married.

Then, if entitled immediately under the will, what estate did they take ? I agree with the learned Chief Justice that they took an estate in fee tail, and that the brothers of the testator were entitled to a remainder over in the estate of either of the daughters who might die without leaving lawful issue.

Then, as to the right to convey, the 4th section of chap. 83, Consol. Stat., U. C., respecting the assurance of estates tail, authorises every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons whose estates are to take effect after the determination or in defeasance of such estate tail, and under this provision there seems to me to be no doubt that the defendants were entitled to dispose of and

convey an estate in fee simple absolute, in such property as they held under the will at the time of the execution of the deed.

BURNS, J., concurred.

Judgment for plaintiff on the case as stated.

DOUGALL ET AL. V. MOODIE.

Bond to the limits—Loss of—Action for not assigning—Omission to procure allowance—Liability of sheriff—Immaterial issue—Pleading.

One L. was ordered to pay the plaintiffs certain interlocutory costs in a suit which he had brought against them, and an attachment having issued against him he was arrested, and gave the usual bond to the limits. He had never left the limits, but neglected to get the bond allowed within thirty days, and the plaintiffs thereupon called upon the sheriff to assign the bond. Having lost it the sheriff was unable to assign by endorsement in the usual form, but he offered to prove the loss, and execute a separate assignment, or to give the plaintiffs authority to sue in his name. The plaintiffs declined this, and brought an action against him, alleging in one count refusal to assign, and in another charging an escape. Defendant pleaded to the first count that he was always ready to assign, but that the plaintiffs never required or tendered to him any assignment for execution, and that he gave them notice that they might sue on the bond in his name; and to the other count not guilty. There was also a count for not arresting, on which it was admitted at the trial that defendant must succeed. A verdict was by consent entered for defendant on all the counts, with leave reserved to move to enter it for the plaintiffs, if the court, drawing the same inferences as a jury, should think them entitled to recover.

Held, that the defendant was entitled to a verdict on the first count, for though the plea might be immaterial, because the sheriff is bound to prepare the assignment himself, yet the plaintiffs had not demurred but taken issue; and the action being without merits, if the jury had found for defendant judgment *non obstante* would not have been granted. But, *semble*, *per Robinson, C. J.*, that the issue was not immaterial, for the plea might be taken to deny that the plaintiffs required the sheriff to assign, and the evidence shewed that on such an issue defendant should succeed.

Burns, J., dissenting, on the ground that the plea being no answer to the first count, the plaintiffs, as the case was left, were entitled to have a verdict entered for them upon it.

Held, also, that on the second count the plaintiffs could not recover, for the fact of the bond not having been allowed within the thirty days would not make the sheriff liable for an escape where the debtor remained on the limits.

The first count of the declaration was for neglecting and refusing to assign to the plaintiffs a bond taken by the defendant, as sheriff, from one Andrew Lawder and his sureties, for Lawder remaining on the limits of the gaol of the county of Hastings, with the usual condition of a limits bond. In

that count it was alleged that the plaintiffs were ready and willing to pay, and tendered to the defendant as sheriff the costs payable to him for executing the assignment of the bond, and also tendered to him an assignment for his signature and seal of office thereto, but that defendant refused to assign the bond, giving only as his reason for such refusal that the bond was then lost or mislaid, and could not then be found, by reason whereof the plaintiffs were prevented from bringing any action on the said bond, and prevented from recovering the sum of £11 11s. 10d., being the amount for which Andrew Lawder was attached, and for which the said limit bond was given.

2. The second count, setting out all the facts as in the first count, was for not arresting Andrew Lawder on the attachment for costs in favour of the plaintiffs.

3. And the third count, setting out the same proceedings as in the two other counts, and the arrest of Andrew Lawder under the attachment, charged the defendant with an escape.

Pleas:—1. That defendant was always ready and willing to assign the bond in the first count mentioned, but that the plaintiffs never required or tendered to the defendant any assignment for execution, and that defendant gave the plaintiffs notice that they might prosecute the said bond in the name of the defendant.

2. To the second count, that defendant did, before the commencement of this suit, arrest the said Andrew Lawder, and that he, Lawder, did, according to the form of the statute, give bail to the limits of the county of Hastings, in which county he was attached, and that the said Andrew Lawder hath been from thence and then was on the said limits under the said attachment.

3. To the third count, not guilty.

This case was tried before *Hagarty*, J., at Belleville, and it was agreed that the defendant was entitled to a verdict on the second count for not arresting. A verdict was by consent rendered for the defendant on all the counts, with leave to the plaintiffs to move to enter a verdict for them for £13 1s., if the court, who might draw the same inferences as a jury, should think them entitled to recover.

Cameron, Q. C., obtained a rule *nisi* accordingly, to which *Bell* (of Belleville) shewed cause, citing *Calcutt v. Ruttan*, 13 U. C. R. 220; C. L. P. A. 1856, secs. 300, 302; C. L. P. A. 1857, sec. 25.

ROBINSON, C. J.—This appears to be an action of a very trifling nature, and I fear a vexatious action against the sheriff. The plaintiffs limited their claim to £13, and it certainly must have appeared at the trial that they had no just claim even to that amount. The jury found a verdict for the defendant, and we are asked to allow a verdict to be entered for the plaintiffs upon leave reserved at the trial, it being consented that the court are to draw such inferences from the evidence as, in their opinion, the jury should have drawn.

The action is by the two plaintiffs, who were defendants in an action brought against them by one Lawder, in which action it was ordered by the court that Lawder should pay to them certain interlocutory costs of small amount, and an attachment was granted against Lawder for not paying them, upon which attachment he was arrested by the sheriff (defendant in the present action) and was admitted to the limits upon a bond given in the usual form. This bond Lawder did not procure to be allowed within thirty days, as the practice requires, for which reason, though Lawder had never left the limits, the present plaintiffs, as they aver, called upon the sheriff, as they might do under the statute, to assign the limits bond to them, in order that they might sue upon it. The sheriff, having lost the bond, could not assign it as usual by endorsement upon it, or by an assignment in which it could be referred to as being annexed, but he offered to do all that it was in his power to do, and no doubt an assignment could have been made of the lost bond as of any other lost deed.

The first count in the declaration was special, for refusing or neglecting to assign the bond; the second count charged the sheriff with a breach of duty in not arresting; the third was for allowing Lawder to escape after having arrested him. It was admitted that the defendant was entitled to a verdict on the second count, for he did arrest Lawder.

To the first count a special plea was put in, setting out the loss of the bond and the sheriff's willingness and readiness to execute an assignment, but that none was tendered to him for execution. That plea may not have been a good bar, because, as the sheriff receives a fee for the assignment, it may be contended that it rested with him to prepare and execute it, and deliver it on request; but the plea was not demurred to; the plaintiffs took issue upon it in the common form, and the only question the jury had to try was whether the plea was proved or not. It seems to have been proved by the evidence given upon the trial, and if so it was right the verdict should be for defendant, as it is, on that issue; and if the plaintiffs had moved in term for judgment *non obstante veredicto* on account of any defect in the plea, we should hardly have granted it, for such an order is only made in the court's discretion, to prevent a *meritorious* cause of action from being defeated by a bad plea.

As to the count for escape, not guilty was pleaded to it. I doubt if a debtor being in custody, either upon an execution or attachment, can be held to have escaped so long as he has been always within the limits of the gaol, for he is in contemplation of law in legal custody in the gaol, the limits being made part of the gaol. This position, which I take to be quite true, does not always seem to have been present in the minds of those who have framed the different acts relating to prisoners for debt, as a reference to 11 Geo. IV., ch. 3, sec. 2, and comparing it with 19 Vic., ch. 43, sec. 303, will shew.

In the earlier statutes which first assigned limits to the gaol, and afterwards gradually extended them till they have been made at last commensurate with the county, it seems to have been clearly understood that the sheriff was not to be held liable as for an escape of the debtor, so long as such debtor did not depart from the limits. The statute 11 Geo. IV., ch. 3, sec. 2, makes that clear; and it would seem absurd and inconsistent to suppose that any thing else could be intended, for the moment the legislature assigned limits to the gaol, which gave to the debtors confined in it a range beyond the walls, at first to the extent of six acres, then of

sixteen, then for the space of half a mile each way from the gaol, then so as to include the whole county town, and at last to embrace the whole county, they did by such acts declare that imprisonment for debt, as a measure of coercion, need not be, and ought not to be, more severe and stringent than they made it, from time to time, by their several acts, reserving, as they did, to the courts the power to take the debtor from the limits and to commit him to close custody within the walls of the gaol, upon a special application, where it should be made to appear that the debtor had fraudulently conveyed away his property, or had the means within his control of satisfying the debt, or a considerable portion of it. These statutes in effect, I think, made the limits in each case part of the gaol, and therefore while the debtor continued within them he was always in legal custody, in execution in such manner as the law had allowed, just as much as if he were within the walls of the prison—this condition, however, being always expressed in the statute, which was obviously necessary for the protection of the officer, that it should not be incumbent on the sheriff or other officer to allow any debtor the benefit of the limits, unless such debtor shall furnish good and satisfactory security that he should not at any time during his confinement go or move beyond such established limits.

The legislature could not in reason have put the measure on any other footing, and this left the sheriff on precisely the same footing as the sheriff has always been in England in regard to prisoners whom he chooses to admit to the rules. The King's Bench prison there being under the control of the Court of King's Bench, that court has, by various rules, published from time to time, from the reign of George I. downwards, extended the limits of the prison, by declaring that certain spaces in its vicinity shall form part of it. The sheriff, as the consequence of such rules, is at liberty to keep debtors in execution either within the walls of the prison or any where else within those limits, as he may think fit. The debtor is regarded as being within the prison so long as he is within the limits assigned to the prison by the rules, and unless he goes beyond

them the sheriff can be guilty of no escape. This is fully explained and recognised in the judgment given in this court in Michaelmas Term, 2 W. IV., in *Campbell v. Lemon*, (2 O. S. 406, 419,) and the authorities cited in it.

An escape is a tort—a wrong committed by the sheriff—and no such wrong can have been committed by him so long as he has always had the prisoner in custody within the limits of the gaol. It is true that in the Common Law Procedure Act of 1856, sec. 302, the bond for the limits is required to contain other conditions besides that which binds the debtor not to depart from the limits; and in section 303 of the same act it is provided, that so long as the debtor shall remain within the limits, and not depart therefrom, *and shall in all other respects observe* the conditions of the bond, *the sheriff shall not be liable to the party at whose suit such debtor was confined in any action for the escape of such debtor from gaol.* But would it be reasonable to draw from this negative provision, that the sheriff *shall not be liable* for escape so long, &c., the inference that the sheriff shall be liable for an escape of the debtor who has always been within the limits of the gaol, and never been a moment out of his custody, because such debtor has failed to observe some other condition of this bond of himself and his sureties than that which relates to his remaining within the limits? I confess I cannot come to that conclusion.

But at the time of the facts occurring which are made the ground of this action, it was the statute 20 Vic., ch. 57, sec. 25, that governed this matter. That clause for the first time provided that the bond for the limits should, besides other conditions, contain this, namely, that the debtor shall, within thirty days from the delivery of the bond to the sheriff, procure it to be allowed by the judge of the county court of the county in which the debtor is confined, and shall have such allowance endorsed, and that the sheriff shall for that purpose, upon notice from the debtor, cause the bond to be produced before the judge, “and upon such allowance being so endorsed, *the sheriff shall be discharged from all responsibility* respecting such debtor, unless such debtor be again committed to the close custody of such sheriff,”

(that is within the very walls of the gaol,) "in due form of law; and the said bond shall, upon any breach of the above mentioned condition, be assignable in like manner and the like remedies be had thereon as is provided in respect of other breaches in the 305th section of the said Common Law Procedure Act contained." That 305th section merely provides in what form the sheriff is to assign such bonds for any breach of the condition, which shall enable the assignee to sue in his name on the bond, and that upon executing it "the sheriff shall be thenceforth discharged from all liability on account of the debtor or his custody."

I cannot gather from these provisions the conclusion that when a debtor, to whom the sheriff has given the benefit of the limits upon taking a proper bond, including such a condition as I have just recited, that the debtor shall within thirty days call upon the sheriff to produce the bond and procure it to be allowed:—I cannot, I say, conclude that where such debtor who may be any where within the county, neglects to observe that condition, the sheriff by reason of such neglect of the debtor, shall be held guilty of an escape, though the debtor has never been out of the county, and though the 301st section of the C. L. P. A., 1856, in force at the time, expressly enacts "that the limits of each county and union of counties in Upper Canada for judicial purposes shall be, and are thereby declared to be, the limits of the gaols of such counties or unions of counties respectively.

To be sure if the legislature had in terms enacted that the sheriff should under such circumstances be held *to have suffered an escape*, we must have given full effect to the provision, but as it would have been an enactment very absurd and unreasonable, and as the legislature has not made it, we must not, I think, supply it by intendment, but must leave the plaintiff in the action to his remedy upon the bond for recovery of such damages as the jury may give him for the breach of this particular condition. This can certainly be no hardship upon him, when we consider that if the debtor shall leave the county the plaintiff will have a clear right of action against the sheriff for an escape, owing to the sheriff

not having been relieved from his responsibility by the debtor procuring the bail to be allowed, and when we consider, also, that so long as the debtor continues on the limits the plaintiff has him in custody for satisfaction of his debt, having him in truth within the limits of the gaol and under the influence of that degree of coercion which the legislature deems sufficient when there has been no fraud shewn.

For these reasons I think that, although that condition of the bond has been broken in this case which bound the debtor to procure his bail to be allowed, yet no *escape* was proved, and that the plaintiff was therefore not entitled to a verdict upon the third count, which simply and in the ordinary form charges an escape.

Nor do I think, as I have already said, that the plaintiff was entitled to recover upon the first count, in regard to which the evidence leaves no room for doubt that the sheriff and the plaintiffs' attorney differed only on a question which grew out of the loss of the bond, which could not be helped after it had occurred. That accident would have been of no consequence if the plaintiffs' attorney had been willing to accept of the assignment, which could well have been made by a separate instrument, and would have answered every purpose; but this the plaintiffs positively rejected, and it was therefore of no consequence that the sheriff did not go through the form of preparing the assignment, which he was told by the plaintiffs would be rejected.

The plea to that first count was in substance proved; and whether it was a good plea in bar was not the question at the trial, but whether it was true or not. If we were to hold that the jury should have found for the plaintiff upon that issue because the plea was insufficient in law, we should be holding that the jury ought to have acted as if the plea had been demurred to, and as if it rested with them to dispose of the demurrer.

But the case is in fact stronger against the plaintiffs' right to recover under the first count than I have stated it to be, for the 305th section of the Common Law Procedure Act of 1856, does not make it the duty of the sheriff to assign a bond for the limits until he has been required by the plain-

tiff in the action to do so ; and the plaintiff in his declaration accordingly expressly avers that he did require the sheriff to assign his bond. The defendant in his plea to that count alleges, " that he was always ready and willing to assign the bond in the said count mentioned, but that the plaintiffs never required or tendered to the defendant any assignment for execution, and also that he, the defendant, gave the plaintiffs notice that they, the plaintiffs, might in the name of the defendant prosecute the said bond."

Now, if the defendant had merely pleaded that the plaintiffs had not tendered him an assignment of the bond for execution, the plaintiffs might safely have demurred to the plea, for the reason already stated ; but taking the plea to import, as I think it does, that the plaintiffs never required him to assign the bond, it is a sufficient defence, and what is said about an assignment not having been tendered for execution may be discarded as immaterial ; for the plea, in averring the want of any request to assign the bond, states what is of itself a good legal defence, for it traverses the statement of request in the plaintiffs' declaration, which was indispensable to the maintenance of their action.

The denial in the plea that the defendant was required to assign the bond it is true is not made with careful attention to grammatical construction, but it is so expressed as to be clearly understood, and the question is whether the plaintiffs can be said to have proved the affirmative of the issue. It cannot be said that they did, for the evidence shewed that they did in fact reject the assignment of the bond in the only form in which under the circumstances it was possible to give it to them. If the plaintiffs would have accepted the assignment under the sheriff's seal by a separate deed with proper recitals, they were told they could have it at once, but they persisted, it seems, in exacting what they knew could not be given to them, and what was unnecessary to the maintenance of the action in their name ; in other words, they made their request in a manner which made a non-compliance with it no breach of the condition, which would have been substantially complied with by making such an assignment as they were told they might have.

The plaintiffs have acted as if they imagined that by losing the bond the sheriff had placed himself in the same situation as if he had allowed the debtor to escape, which in my opinion is a position that cannot be maintained. I think the rule *nisi* should be discharged.

McLEAN, J.—From the evidence of the deputy-sheriff on the trial this certainly appears to be a very vexatious action, and it is difficult to suppose that it has been brought in this court for the sole purpose of recovering the paltry sum of £13 1s. The defendant in his situation as sheriff appears to have done his duty by arresting on the attachment placed in his hands, and by taking bail for the limits with sureties from the party arrested. The bond was shewn to Mr. Dougall, one of the plaintiffs, by the deputy-sheriff in the street, and whether it remained in his possession or has been lost by the deputy he was unable to say. It appears that the party arrested did not, according to the condition of the bond, cause and procure the same to be allowed by the judge of the county court, and the allowance to be endorsed thereon, within thirty days from the delivery of such bond to the sheriff. The plaintiffs were aware of that fact, and after the exhibition of the bond by the deputy-sheriff to Mr. Dougall demanded an assignment of it to be endorsed on it, or an assignment with the bond annexed. Mr. Dougall was informed that the bond had been lost, and therefore that no assignment could be endorsed upon it, and it could not be annexed to an assignment; but the deputy-sheriff offered to prove the loss of the bond, and to execute such an assignment as was then in the power of the defendant to make, and Mr. Dougall was further offered to be furnished with any authority to sue the parties to the bond in the defendant's name, saving the defendant free from costs. All these propositions, which if the recovery of the money were the only object ought to be sufficient, were rejected by the plaintiffs, and then no assignment would be accepted unless the bond, which they knew was lost, were also delivered over; and this action has been brought.

The plaintiffs allege that they tendered to the defendant

a bond to be executed, and the amount of his fees as sheriff for executing it. To this allegation the defendant pleads that he was always ready and willing to assign the bond, but that the plaintiffs never required or tendered to the defendant any assignment for execution, and that the defendant gave the plaintiffs notice that they might prosecute the said bond in the name of the defendant. The plaintiffs have taken issue upon this plea, and have moved that the verdict shall be entered for them on this as well as on the other issues. It is I think an immaterial issue, inasmuch as the plaintiffs were not under any obligation to tender an assignment for execution, and the defendant, being allowed a specific fee for such assignment, was bound to execute it when demanded. It is therefore quite immaterial to the action whether an assignment was or was not tendered for execution, and if the plaintiffs were entitled to a verdict on the other issues they would be entitled to judgment *non obstante veredicto*. But on the second issue it was admitted on the trial that the defendant was entitled to a verdict. An arrest was distinctly proved, and the plaintiffs cannot now claim to have a verdict entered for them on an issue which on the trial they admitted must be given against them.

Then as to the third issue, which is taken on the count for an escape, was there in fact any proof of an escape, or any thing proved which entitles the plaintiffs to sue as for an escape? So far from any escape having been proved, it was shewn that Lawder, the party arrested, has been on the limits ever since his arrest, and that at the time this action was brought he was then in the defendant's custody on the limits. The responsibility of the defendant as sheriff was still in force for his safe keeping, in consequence of the default of Lawder in getting his limits bond allowed and the allowance endorsed by the county judge within thirty days after it was delivered to the sheriff. The allowance of the limits bond was only necessary for the purpose of relieving the sheriff from all responsibility for the safe keeping of Lawder; in all other respects, and for all other purposes, I take it, it was perfectly valid without such allowance. The sheriff could have taken Lawder into his custody and com-

mitted him to gaol at the end of thirty days if he failed to get the bond allowed so as to relieve the sheriff from all responsibility, but he was not bound to do so; and if Lawder while on the limits was at any time guilty of a breach of the condition of the bond, he and his sureties could be sued, either by the sheriff or by the assignees of the sheriff on the bond being assigned, and they could not object to their bond that it had not been allowed by the county judge.

It appears to me that the very fact of suing the sheriff for refusing or neglecting to assign the bond must be taken to be a distinct acknowledgment of the validity and sufficiency of such bond, for it could be of no possible advantage to the plaintiffs to have an assignment unless to sue on a breach of some of the conditions. The only condition shewn to have been broken is that which relates to the procuring the bond to be allowed by the county judge. For the breach of that condition by Lawder and his sureties the plaintiffs seek to make the sheriff responsible as for an escape. The action, as it appears to me, would be equally sustainable if Lawder had failed to comply with the condition by which he is bound to observe and obey all notices, orders, or rules of court, or to answer interrogatories.

All that the sheriff can be held responsible for is the safe keeping of the party on the limits. He has a bond from responsible parties that Lawder shall remain on the limits, and that he shall observe certain other conditions prescribed by the statute. That bond he retains without its being allowed by the county court judge, and if the sureties are insufficient he will be responsible to the plaintiffs for taking insufficient sureties, if they sustain any injury thereby. For any other breach than that which relates to the party remaining within the limits the plaintiffs' only remedy is on the bond, and not against the sheriff.

By the evidence it appears, I think, very clearly that there has been no escape of Lawder from the custody of the sheriff, and for any other breach of the condition of the bond he is not responsible.

On the two substantial issues I think the defendant is entitled to succeed, and also on the immaterial issue, so far as he may be entitled to costs thereon.

By consent of parties this court has power to draw the same inferences as a jury from the facts of the case, and in the exercise of that power I can arrive at no other conclusion but that the defendant is entitled to a verdict on all the issues, and that the plaintiffs' rule must be discharged.

BURNS, J.—The plaintiffs having abandoned their second count at the trial, it is therefore proper enough that the verdict upon that count should stand in the defendant's favour, but the question is whether the plaintiffs are entitled to have the verdict entered in their favour upon either the first or the third count.

I regret to say that I feel myself compelled to decide in the plaintiffs' favour upon the first count. By the way in which the case has been put to the court at *nisi prius*, we are left to determine the matter as a jury might do, and the plaintiffs have moved to enter the verdict for them. If we had no other function to discharge than simply to say whether the evidence would justify a jury in finding for the defendant, then we might let the verdict stand, but it seems to me this application involves more than that principle. I think the effect of the parties agreeing at the trial to let the court decide, and as to matters of fact that the court may draw such inferences as a jury might, places the court not only in the position of the jury to determine what the facts are, but the court must also adjudge the rights of the parties according to the pleadings. The only plea which we can look at as an answer to the first count is the one upon the record as it stood at the trial. The plaintiff, instead of demurring to the plea, took issue upon it. But suppose the evidence did prove the plea, yet we see that the plea is no answer whatever to the count, and that the plaintiff should have the judgment upon it. It is like a judgment by default, and going down to a jury, as the plaintiff would have to do, for the purpose of assessing damages.

If we were to give judgment for the defendant, there would be error upon the record apparent, and the court of error would reverse the judgment, and direct a venire to assess the plaintiffs' damages; and when that is plain, it appears to

me, when the plaintiffs have asked us to render the verdict for them, it is our duty to do it. Any other course than that I fear would prevent parties leaving cases to the court at *nisi prius*, and would tend very much to embarrass us in the disposition of business.

The action ought not to have been brought, but when I say that I must also say the sheriff was altogether wrong in not making an assignment of the bond and offering it to the plaintiffs, for he might have done this although the bond was lost, and the sheriff was still further wrong in placing his defence upon the footing, as he has, that it was the duty of the plaintiffs to prepare and tender to the sheriff an assignment of the bond.

I think the plaintiffs should recover the £13 1s. upon the first count.

Rule discharged, *Burns, J.*, dissenting. (a)

THE EDINBURGH LIFE ASSURANCE COMPANY V. GRAHAM.

Usury—22 Vic., ch., 85 sec. 6—*Construction of*—*Life assurance.*

The exception in the last clause of 22 Vic., ch. 85, which prevents corporations &c., “heretofore authorised by law to lend or borrow money,” from charging more than six per cent interest, applies only to corporations created for the purpose of lending money, or at least expressly authorised to do so, not to all who by the general law are allowed to lend it.

The defendants, a Life Insurance Company, were in the habit of lending money, but made it a condition that all borrowers should insure their lives with them for double the amount of the loan.

Semble, that even if the exception above mentioned had applied to them, this would not constitute usury.

This was an action of ejectment brought upon a mortgage, which the defendant contended was void for usury.

It was dated the 7th of February, 1859, and was made by defendant to secure to the plaintiffs the sum of £100 sterling, made payable by the mortgage. That was the sum which the defendant desired to borrow, and which the plaintiffs contracted to lend.

At the trial, at Toronto, before *Hagarty, J.*, it was agreed to submit to the court whether the plaintiffs were within the exception in regard to the operation of the statute

(a) See *Brown et al. v. Paxton et al.*, ante, page 426.

amending the usury-laws, so as to leave them liable to the law against usury as it formerly existed; and if they were and are so liable, then whether the mortgage sued on was void for usury.

The facts appear in the following evidence of David Higgins given upon the trial:—

“I am secretary of the plaintiffs. Our solicitors, Messrs. Read & Leith, arranged the mortgage. We gave Graham a cheque equal to £96 16s. 5d., sterling, no more. We deducted half a year's interest in advance. We gave £100 sterling, less the half year's interest, which defendant agreed to pay in advance. We are in the habit, when we lend money, of requiring persons to insure their life with us. We never lend more than one half the amount insured. Defendant agreed to insure his life for £200, and borrowed £100.

Cross-examined.—I look at a policy. It was issued in Scotland. It is dated the 2nd of August, 1858. Defendant paid the premium about that time. Six months before the loan he paid the premium here, about the 2nd of August, for the year, and the policy was sent out as soon as possible. The next annual payment (August, 1859) he did not make. No loan was made to him till after the insurance. He applied for a loan about the time of the policy. People must be insured before they get a loan. Till then we receive no application. We follow the life insurance here independently of lending money.

Re-examined in chief.—I knew or thought he wanted a loan. Every one is told that we will not lend till insurance is effected, and we lend or not as we think proper afterwards. We give interim receipts for premiums on policies, and send to Scotland. We have to pay if he die an hour after giving our receipt. The applications for loans are disposed of here. We accepted the risk and gave receipt; all they had to do at home was to send the policy. A long delay occurred in defendant perfecting the security. The policy was in our hands ready for defendant before the mortgage, and defendant could have had it whether a mortgage was made or not. I told defendant we would not lend except to those who insured with us. This policy is now cancelled, as he did not pay. We now claim a half year's interest on the mortgage, and an amount paid for fire insurance with another company, which we had to pay, as he did not according to agreement, \$21.20.”

Upon this evidence it was contended that the mortgage was void for usury, on account of more being deducted from the sum to be lent, and for which the security was taken,

than could be legally withheld on account of interest, assuming the plaintiffs to be limited in such a transaction to the legal rate of interest at the time, that is, six per cent; and it was contended that the plaintiffs could not collect more by reason of any thing contained in either of the statutes, 16 Vic., ch. 80, or 22 Vic., ch. 85.

A verdict was rendered for the plaintiff, leave being reserved to move to enter a nonsuit.

McMichael obtained a rule *nisi* accordingly, to which *Cameron* Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

As to the statute 16 Vic., ch. 80, the fourth section of it would prevent its extending for any purpose to the plaintiffs, for that clause provided that nothing in the act should be construed to extend "*to any insurance company.*" If therefore no later statute had been passed upon the subject of interest, the plaintiffs would have stood on the same ground as regards their right to charge interest, as if the laws which had regulated interest before that act had never been repealed or altered.

Then as to the subsequent act, 22 Vic., ch. 85, which was in force at the time this mortgage was made. Did that change the position of the plaintiffs in this respect? It undoubtedly has freed them from all restriction as to the interest they may contract for and enforce, if there be nothing in the sixth clause of that act which prevents its having that effect. This clause runs thus, "Nothing in this act shall be construed to apply to any corporation, or company, or association of persons, not being a bank, heretofore authorised by law to lend or borrow money." In determining what is meant by this clause, we must look back, we think, to the 4th clause of 16 Vic., ch. 80, and consider also the third as well as the sixth clause of the later act, 22 Vic., ch. 85.

The legislature appears to us to have meant, that while banks might lend at any rate of interest as high as seven per cent, but not higher, any other money-lending institution—that is, any corporation or association of persons created for

the purpose of lending money, or at least *expressly authorised* to do so—should be left as they were before that act was passed. The effect of the act so construed is, for all that we see in evidence, that though it is clear that the position of the plaintiffs (being an insurance company) would not have been affected by the 16 Vic., ch. 80, if that act were still in force, by reason of the express exception of insurance companies contained in the last section, and they would have been disabled from lending money at a rate of interest above six per cent, yet in February, 1859, when the mortgage was made, and when the whole matter was controlled by the 22 Vic., ch. 85, they were subject to no restriction in regard to interest which they might contract for and enforce upon moneys invested by them. The companies or corporations coming clearly within the last clause are left now upon the same footing as they were before the 16 Vic., ch. 80, that act being repealed, and the later act, 22 Vic., not applying to them; and the whole question upon the effect of the several statutes turns upon the force to be given to the words in the 6th section of 22 Vic., ch. 85, “heretofore *authorised by law* to lend or borrow money.” Undoubtedly there is room to contend that these words must extend to all associations which *can* legally lend or borrow money, but we can only say that our conviction is that the legislature did not use them in that unrestricted sense, which would include every investment that a corporation or association could make of the capital or profit by way of loan, just as an individual puts out money on loan for which he has no immediate use in carrying on his proper business. They meant, we think, not to except all such corporations or associations as were not by law prohibited or disabled from lending money, but those only who were *authorised by law*—that is, had power expressly given to them by law—to carry on such business; such, for instance, as the Trust and Loan Company of Upper Canada, which are allowed by statute 13 & 14 Vic., ch. 138, to lend money at eight per cent., but no more. We do not think the clause was meant to embrace all associations who by the general law of the land are merely *allowed* to loan money.

If this construction be correct, then it is not necessary to enquire whether what was done in this case would constitute usury under the provisions of the old law existing before the passing of the 16 Vic., ch. 80. If we had to determine that point at present, we think we should hold that there is nothing in the defence, for that what was done in this case did not amount to usury. The plaintiffs had a right to make it a general rule that they would not lend money except to persons who would insure their lives with them at their established rates of premium. If the charges made of premium for keeping up an insurance with another office, in consequence of the defendant having allowed his policy from the plaintiffs' company to drop, be not such as can be enforced, that would form a defence against the charge, but would not constitute usury. The course taken by the plaintiffs, according to the evidence, shewed a desire to increase their business of insuring lives, but cannot, we think, be tortured into a contrivance to exact an illegal rate of interest.

We will add, in regard to the other more general question in the case, that at first sight it may appear an unreasonable construction of the statute 22 Vic., ch. 85, sec. 6, which would give to corporations which are merely allowed to lend money, (that is, not prohibiting from lending,) the privilege to be exempt from the former stringent usury laws, while those which are created for the purposes of lending money, either exclusively or for that purpose among others, or who are by the terms of their charter expressly authorised to lend money, are denied that privilege; but upon reflection it will not, we think, appear so. The legislature could not have allowed associations which were exclusively or principally money-lending institutions to charge as high a rate of interest as they pleased, without releasing the Trust and Loan Company and the banks from the restrictions imposed upon them in that respect. It is quite clear that they had not made up their minds to do so, for reasons which we can readily understand, though they may not perhaps be hereafter steadily allowed to govern. But, on the other hand, we cannot believe that the legislature intended to restrict all corporations and associations, of whatever kind,

which might have money to invest, from making such contract in regard to interest as individuals might, since their operations in that way, being limited and casual, would not be likely to have much influence as governing the rate of interest.

In our opinion the rule *nisi* should be discharged.

Rule discharged.

GASTON V. WALD.

Accidental fire—Liability—14 Geo. III., ch. 78, sec. 86.

Defendant occupied a stall in a market, the cellar beneath which was used by the plaintiff to keep goods in. He went out, leaving a fire in his stove, with no one to watch it, and a block of wood too close to the stove. A fire broke out which burned through the floor, and destroyed the plaintiff's goods below, and the jury found that such fire was occasioned by defendant's negligence.

Held, that it was nevertheless an *accidental fire*, within the 14 Geo. III., ch. 78, sec. 86, and that defendant was not liable.

The declaration charged that the plaintiff being in possession of a certain cellar or vault under a certain stall occupied by the defendant, in which vault he had certain goods and chattels, the defendant carelessly, negligently, and improperly placed in his stall a certain lighted stove, without proper or ordinary precaution against accidents, and in close proximity to certain combustible materials, and carelessly, negligently, and improperly *left the same unwatched* for a long space of time, by reason of which carelessness, negligence, and improper conduct of defendant, the said stall became ignited, and the fire so caused spread and communicated to the vault of the plaintiff, whereby a large amount of goods being in the vault were burnt, destroyed, damaged, and utterly lost to the plaintiff.

Plea, not guilty.

At the trial, at Guelph, before *McLean*, J., it was proved that defendant occupied a butcher's stall of about ten feet square, in the Guelph market, in which he carried on his business: that the plaintiff had the cellar of the same size directly under the defendant's stall, in which the plaintiff had in store butter, eggs, vegetables, and other articles, which

he was in the habit of selling in a huckster's shop kept by him in Guelph: that on the 29th of December last, the weather then being extremely cold, the defendant, on leaving his stall on the closing of the market, about half-past two o'clock, put some wood into the stove, and closed the stove damper, in order to prevent his meat from freezing; and that when he left the stall the block on which he usually cut his meat for the supply of customers, was left in its usual position, about a foot and a half from the side of the stove; that the side of the block seemed to be partially decayed, and very dry, and charred by the heat of the stove; that there was not any pan, or sheet of tin or zinc, between the stove and the floor, and no bricks in the bottom of the stove. Between 11 and 12 o'clock on the night of the 29th of December the alarm of fire was given, and it was found that the plaintiff's cellar was on fire, and the fire being extinguished, it was found that the floor of defendant's stall had burnt through, and that the defendant's stove had fallen into the cellar. The block which had stood near the stove was burnt to the depth of about five inches on one side; and the defendant, on the morning after the fire, stated that he thought the block had caught from the stove.

The clerk of the market stated that during the winter months the butchers had stoves in their stalls for their own comfort as well as to prevent their meat from freezing, and that there were no market or police regulations as to the manner of putting up the stoves, or of keeping or extinguishing the fires; that it was known that the butchers were in the habit of leaving fire in their stoves, on closing their stalls, to prevent the freezing of their meat, and that some of them were very careless in the management of their stoves.

Several witnesses, who saw defendant putting wood in his stove before leaving, stated that at the time he did so the stall was only moderately warm, and they made no remark or objection to him on the subject of leaving a fire in his stall.

A witness, who was in the service of the plaintiff at the time of the fire, and for two years previously, but who had commenced business for himself before the trial, was called

for the plaintiff, probably for the purpose of proving the dangerous proximity of the defendant's chopping block to the stove, and stated that he was absent from the place at the time of the fire, and during the previous day: that during the two years he was with the defendant he was usually last in the shop, and always looked after the fire: that he had always thought the block stood too near the stove, and that he in consequence seldom left much fire in the stove on leaving, though he occasionally in very cold weather threw in a little wood before closing: that while engaged in the stall during the day he had often seen the stove red hot without setting fire to the block: that the stall was small, and the block had been placed where it stood so as to have it in a convenient place for use, and it had stood there from the time the stove had been put up the previous fall.

On the part of the defendant, it was shewn that he had an unusually large stock of meat in his stall at the time of the fire, and that he had left his books there: that at the time of the fire in the cellar, though the stall was full of smoke, no fire could be seen, while a blaze was visible in the cellar, ascending up to the ceiling, some of which was broken through; that while engaged in the stall large fires were made in the stove, and though it was often red hot it had never set fire to the block.

At the close of the plaintiff's case, *Fergusson* moved for a nonsuit, on the ground that under the statutes 6 Anne, ch. 31, and 14 Geo. III., ch. 78, no action could be maintained against the defendant: that the fire on defendant's premises was shewn to be accidental within the meaning of the first mentioned act, which expressly provides that no action shall be maintained in such a case.

The learned judge overruled the objection at the time, reserving leave to the defendant to move in term upon it, and the case went to the jury on the facts.

The jury were directed merely to enquire whether the fire by which the plaintiff's effects were injured or destroyed, was in fact caused by any negligence or improper conduct on the part of the defendant, and if they came to the conclusion that it was so caused, then the amount of damages which the

plaintiff had sustained. The jury found a verdict for the plaintiff, and \$40 damages.

M. C. Cameron obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered, pursuant to leave reserved.

Palmer shewed cause, and cited *Viscount Canterbury v. The Attorney-General*, 1 Phil. Ch. Cas. 306; *Bl. Com. I. 431*; *Vaughan v. Menlove*, 3 Bing. N. C. 468; *Filliter v. Phippard*, 11 Q. B. 347.

ROBINSON, C. J., delivered the judgment of the court.

The statute 6 Anne, ch. 31, sec. 6, made perpetual by 10 Anne, ch. 14, and the statute 14 Geo. III., ch. 78, secs. 84, and 86, are to be considered, for if they have not the effect of altering in its general application the common law of England upon the subject of accidental fires in dwelling houses, then the plaintiff in this case would be entitled to recover upon satisfying the jury that the fire in the defendant's house was caused by the negligence of himself or his servants, and that the plaintiff sustained loss in consequence of the fire occasioned by such negligence.

If the statute 6 Anne, ch. 31, was intended to be confined to London and Westminster, and is not fairly applicable to England generally, then it cannot be held to be included in our adoption of the law of England.

The 6 Anne, ch. 31, is no doubt, in the main, a statute applying only to the cities of London and Westminster, but the third and sixth sections of the act appear to have been intended to apply generally, and not merely in London and Westminster. And if that were doubtful, which Sir William Blackstone, in his *Commentaries*, does not seem to have thought, yet the later statute 14 Geo. III., ch. 78, sec. 86, it has been decided must be held to be general in its application. (a) That statute, then, as part of the law of England at the time of our adopting it, has been introduced here. It is a transcript of the 6th clause of 6 Anne, ch. 31, and we have only to con-

(a) See *Bl. Com. I. 431*; *Richards v. Easto*, 15 M. & W. 244; *Filliter v. Phippard*, 11 Q. B. 347.

sider what is the effect that should be given to it in applying it to the facts of the present case. Was the fire in the defendant's chamber, or booth, an *accidental* fire within the meaning of the statute, or was it shewn to have been a fire occasioned by such negligence of the defendant or his servants, that it would bring upon him a civil liability to the plaintiff, although it was in this sense accidental, that it was not wilful.

The cases of *Vaughan v. Menlove*, (3 Bing. N. C. 468,) and of *Filliter v. Phippard*, (11 Q. B. 347,) are not strictly applicable, for they were not cases of fire communicating from one house to another, and there is a difference between them and the present case which may reasonably be allowed to distinguish them.

We do not think we can give to the words used in the statute 14 Geo. III., ch. 78, sec. 86, in "whose house, dwelling, building, &c., any fire *shall accidentally begin*," so limited an application as to refuse to call any fire accidental which arises from a want of due caution, and so hold it to be out of the scope of that clause. Most accidents arise from some degree of carelessness—that is, from the want of such care and forethought as a person habitually and scrupulously careful would probably have exercised—but they are nevertheless accidents, insurers would be liable for their consequences, and that consideration should go a good way, we think, towards solving the question.

It is true that the defendant or his servant in this case no doubt lighted the fire in the stove designedly. There was no accident in that. The words "accidentally begin," as used in the act, are not to be applied in reason, we think, to the fire beginning in the stove, but to the combustion outside. The fire *began* within the meaning of the act, when it first took hold in some part of the building, and the circumstances must be very peculiar, we think, which would warrant us in looking upon such an occurrence as not accidental.

Rule absolute.

IANSON AND THE CORPORATION OF THE TOWNSHIP OF REACH.

By-law—Objection not apparent on the face—Refusal to quash.

Upon an application to quash a by-law passed to close up a road, it appeared that the notices required by law had not been regularly given, but it was shewn that the applicant knew that the step was in contemplation, and had expressed his intention not to take any part in the matter.

Under these circumstances the court refused to quash the by-law, which was not illegal upon the face of it.

Cameron, Q. C., obtained a rule on the corporation to shew cause why their by-law No. 225, passed on the 26th of March, 1860, should not be quashed with costs.

C. S. Patterson shewed cause.

The by-law was one for closing up certain portions of a road called the Brock road, and the objection mainly urged was that it had been passed without the requisite notice prescribed by the statute.

Many affidavits were filed, which it is unnecessary to set out. The facts of the case, and the provisions of the statute bearing upon it, sufficiently appear in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

Upon reading the affidavits we fear it must be allowed that regular notices of the intention to pass the by-law were not given. Notices were given certainly, but some were given in July and August, which were too soon, and they were notices that a by-law would be passed at the first meeting after the 1st of September, whereas the by-law was passed in March.

Other notices were published on the 9th of February—that is, posted up as the act directs—that the by-law would be taken into consideration on the 5th of March, but those were too late for that day, and there seems not to have been a notice properly published in a newspaper of the intention to bring on the matter at that time. The 321st section of the Municipal Act, ch. 54, prescribing the notices to be given in such cases, does not provide that the newspaper advertisement shall be inserted for four successive weeks next before its passing; but they ought to specify correctly the time when it is proposed to bring forward the by-law, or else they would

have little value as notices. Yet they do serve to give notice that such a measure is in anticipation, and thus give to parties the opportunity of petitioning; and whenever a party does petition, then he is secured by the provisions in the 321st clause against the by-law passing without his being heard; that is, unless he fails to attend, having notice of the time when the by-law is to be taken up.

We do not think it compulsory upon the court to quash a by-law not illegal on the face of it for any extrinsic cause of this kind, (a) and here it is shewn that the applicant expressed his determination to take no part in the matter one way or the other.

If this road has not been legally closed any party may prosecute for a nuisance in obstructing it, and have the matter formally determined.

The 318th section provides that no municipal council shall close up a public road, whereby any person will be excluded from ingress and egress to and from his lands or place of residence. It is one of the exceptions to this by-law that it contravenes that provision, but that has not been made clearly to appear.

We do not see that the by-law is illegal on the face of it, either from uncertainty in its provisions or otherwise.

Rule discharged.

HENDERSON V. DICKSON.

Examination of judgment debtor—Order to commit—Privilege of parliament—Consol. Stats. U. C. ch 24, sec. 41.

An order to commit to close custody for not attending to be examined pursuant to a judge's order, is to be looked upon as a commitment for contempt, not as a commitment in execution.

A member of parliament therefore is not privileged from arrest under such order, and a party committed under it is not entitled to his discharge on payment of the debt and costs.

Semble, that if the order be so framed as to entitle defendant to his discharge on payment of the claim, the privilege of parliament would avail against it.

Harman obtained in this term a rule on the plaintiff's attorney to shew cause why an order granted in Chambers

(a) See *Standley and the Municipality of Vespra and Sunnidale*, 17 U.C. R. 69.

by *Richards, J.*, ordering the defendant to be committed to the close custody of the sheriff of the county of Lincoln for one week, for not submitting to be examined pursuant to the judge's order and appointment made in this cause, and served on the defendant, and that said sheriff do arrest and detain the defendant for such period, should not be rescinded, on the ground of the defendant's privilege as a member of the Legislative Council.

On the 9th of May, 1860, a judge's order was made in this action, depending in this court, for the examination of the defendant before the judge of the county court of the county of Lincoln, upon which an appointment was made by the judge of the county court to attend before him on the 25th of May, in Niagara.

The defendant, being duly notified of this order and appointment declined attending, stating that he was advised by counsel that he need not do so.

The defendant, in support of this application, put in Letters Patent dated the 8th of February, 1855, summoning him to the Legislative Council of Canada; and an affidavit of the defendant was filed in answer to the rule, in which it was stated that he had been a member of the Legislative Council since the 8th of February, 1855, on which day he was thus appointed; that he had always since acted as a member of the Legislative Council; that the Provincial Parliament was prorogued on the 19th of May, 1860; that he did not intend to treat the order of this court with contempt, and informed the judge of the county court that he declined attending on the ground that he was a member of the Legislative Council; and that he acted as he was advised by his counsel.

Burns shewed cause, and cited *The Queen v. Gamble & Boulton*, 9 U. C. R. 546; *Lechmere Charlton's Case*, 2 M. & Cr. 316; *Consol. Stats. U. C.*, ch. 24, sec. 41; 12 & 13 W. III., ch. 3; 3 & 4 Vic., ch. 35, sec. 7, *Imp. Act*; 22 Vic., ch. 1, sec. 7.

Cameron, Q. C., and *Harman*, shewed cause, citing 10 Geo. III., ch. 50; *Steph. Com.* 2d Ed. II. 320; *Clark on*

Colonial Law, 37; Goudy v. Duncombe, 1 Ex. 430; 22 Vic., ch. 1, sec. 19; Phelps v. McKenzie, 5 O. S. 80; Mahon v. Ermatinger, 1 U. C. R. 334; The Queen v. Gamble & Boulton, 1 P. R. 222; Meyers v. Harrison, 4 U. C. Chy. Rep. 148; Stockdale v. Hansard, 9 A. & E. 1; Ex parte Dakins, 24 L. J. C. P. 131; Daniell's Chan. Prac. II. 833.

ROBINSON, C. J., delivered the judgment of the court.

After the many instances in which the courts in this country have recognised the right of members of the Provincial Parliament to claim privilege from arrest for debt, most of which were referred to in *The Queen v. Gamble & Boulton*, (9 U. C. R. 546,) we shall assume the right to exist. There were indeed some earlier instances of a judicial recognition of the privilege than are cited in the report of that case.

But admitting the privilege, and that the defendant in this cause was entitled to it as a member of the Legislative Council, which was at the time in actual session, it only follows that if the defendant had been arrested and committed to custody in violation of that privilege, he could apply for a writ of *habeas corpus* and obtain his discharge. The order granted for his examination was an ordinary step in the practice of the court, according to the Common Law Procedure Act, and was properly made, for the judge may have had no judicial knowledge of the fact of the defendant being a member of the Legislative Council, and if he had it would have been no reason against the making the order for examination, since he could not know that it would not be complied with, in which case no question about privilege would arise. But the order to attend and be examined not having been complied with, a judge's order has been made, on that fact being shewn, that the defendant be committed to close custody for a week for not having submitted to the order; and we are asked to rescind that order as having been illegally made in disregard of the defendant's privilege. The order for commitment made in such cases under the 41st section of ch. 24 Consol. Stats. U. C., is such an order as has been determined in England to be in effect a qualified

limited execution against the debtor, rather than a commitment for contempt of court in not obeying the order. In Dakins' case, (16 C. B. 77,) that point was settled by the Court of Common Pleas in England after full discussion.

It was there held, in consequence, that in a case like the present, where a defendant was imprisoned for a certain time by order of a judge of the county court for disobeying an order of that court to attend and be examined as a judgment debtor, he was entitled to his discharge, being a person privileged from arrest for debt; and the court therefore discharged him upon a writ of *habeas corpus*, as they would have done if he had been in custody on a *Ca. Sa.* in the same suit. We have therefore only to consider whether there is ground for any difference between the laws which regulate imprisonment for debt in England and our laws, which should lead to a different conclusion; and that depends, we think, on the question whether, if the defendant, being committed under the order, was to pay the debt and costs in full within the week, he would be entitled to his discharge. If he would, then upon the principles which governed the court in Dakins' case, this order should be considered as nothing more than a writ of execution—a process for coercion of the defendant to pay the debt, and not a commitment by a way of punishment for a contempt of the court which made the order, that is, of this court.

And the question would then be whether the court should abstain from interfering till the party has been arrested, and then order his discharge, or whether they should rescind the order, on the ground that it was illegal to direct a defendant to be imprisoned in execution for debt (regarding the order in that light, on the authority of Dakins' case) who was entitled to privilege from such arrest.

In general, we think the course has been not to move against the *Ca. Sa.* when privilege is claimed, but to apply for discharge of the party from custody, limiting the application to that, as if the *Ca. Sa.* were not irregular, but only the arrest under it. In the case, for instance, of Winter v. Dibdin, (13 M. & W. 25,) that was the course; but in Cassidy v. Steuart, a member of the House of Commons, (9

Dowl. 366,) the court, after discussion upon the particular point which I am now considering set aside the *Ca. Sa.* "There is no doubt," (Bosanquet, J., said,) "that the arrest of a member of parliament during the period of privilege is illegal. Now the question is whether, if the arrest is illegal, it is lawful for the plaintiff in a suit to sue out process directing the sheriff to take the person of a member of parliament in execution."

It appeared to them (they said) that the thing ordered to be done being illegal, the order to do the act must itself also be illegal; and that the defendant should not be put in the situation of having an order issued against him, which, if the sheriff executes it, must put him to the trouble and expense of obtaining redress against that which is an illegal act.

We feel that our way is clear in disposing of this application when we have determined the point whether in this country, as in England, a defendant committed under such an order as is now moved against, would be entitled to his discharge from custody on satisfying the execution at any time, although the period had not expired for which the order directed him to be imprisoned. Have we any enactment which secures to the debtor his discharge upon payment of debt and costs, as is provided by the Imperial Act 9 & 10 Vic., ch. 95, sec. 110? We can find none applicable to the superior courts, though in regard to the division court there is such a provision, as will be found by reading in succession the 165th and 169th sections of the division courts act, Consol. Sats. U. C., ch. 19.

Then the question is whether, in the absence of any similar provision in respect to defendants committed in the superior courts for refusing to attend to be examined in obedience to an order, a defendant who shall be committed on account of so refusing can be treated as being in execution, within the authority of the English decisions which have been cited. We apprehend he cannot be so considered.

If in this case the order for commitment had happened to be so framed (as it sometimes is by sanction of the judge who grants it) as to entitle the party to be discharged at once upon the payment of debt and costs in full, then we

should feel at liberty to take a different view ; but in this case the order for commitment contains no such direction, but simply orders that defendant shall be committed to close custody for a week for not submitting to be examined pursuant to the judge's order and appointment, &c., and that the sheriff shall arrest, and keep and detain the defendant for such period aforesaid.

Then taking our statute Consol. Stats. ch. 24, sec. 41, and this order that has been made under it, we do not feel warranted in holding that the defendant, if committed under that order, could be regarded as being committed in execution, or as being *quasi* in execution, for if he should pay the debt and costs in full immediately on his commitment for a week under the order, we cannot say that he would be entitled to be discharged before the week had expired ; and, on the other hand, if he should have paid no part of the debt when the time had expired, he would nevertheless be entitled to be discharged, so far as that order was concerned.

We have come reluctantly to the conclusion that under such circumstances this order can be looked upon as nothing else but a commitment for contempt of the order, and that the defendant could be legally committed and detained under it for the period mentioned in it, notwithstanding the privilege against being committed in execution, which we take to be a different matter.

We think, therefore, that this rule must be discharged with costs.

Rule discharged.

IN RE WOODBURY AND WIFE, AND MARSHALL.

Overholding tenant—Consol. Stats. U. C. ch 27—First jury discharged.

Where upon a commission issued against an overholding tenant, the first jury summoned could not agree, and were discharged,

Held, that the authority of the commissioner was not determined, but that another jury might be summoned and an effectual inquisition held.

Held, also, that on the evidence set out below this was a case within the act, and that the finding against defendant as an overholding tenant was warranted.

Eccles, Q. C., obtained a rule *nisi* on Woodbury and wife,

to shew cause why the commission, and judge's order therefor, the inquisition, and all other proceedings, should not be set aside, the writ and judge's order as having been obtained without sufficient foundation therefor, and the proceedings as having been taken after the authority of the commissioners had ceased.

The commission was one obtained by Woodbury and wife in order to dispossess defendant of certain real estate, as having been their tenant for a term which had expired, under Consol. Stats., U. C., ch. 27, 63rd and following clauses.

The commission was directed to Mr. Burritt, judge of the county court of the county of Bruce, the premises leased being in Stratford.

Upon the evidence given and returned with the commission it appeared that Woodbury and wife had made a written lease of these premises belonging to the wife, being a town lot and house in Stratford, on the 26th of July, 1858, to two persons of the name of Imlach, to hold for one year from the 1st of July, 1858, at the rent of £100. The Imlachs within the first year assigned to Marshall, and before the year expired it was agreed, as Woodbury swore in his affidavit, filed when he applied for the commission, between him and Marshall, that Marshall should have the premises one year longer at £75 a year.

On the 2nd of July, 1860, this second year having expired on the 1st of July, Woodbury demanded possession in writing from Marshall, who refused to go out, alleging that in March before, Woodbury had extended his term for three years longer, which Woodbury swore was untrue.

Woodbury, however, in his affidavit admitted that he had promised to grant a new lease of the premises to commence on the 1st of July, 1860, but only on certain conditions to be performed by Marshall: "that Marshall refusing to perform those conditions, the promise to grant such further lease was long before the 1st of July, 1860, rescinded by and with the consent of Marshall, and another and different arrangement spoken of, but which was never perfected or carried into effect."

On this affidavit of Marshall, and another affidavit of the person who served upon him the notice to quit, that when the notice was served Marshall said it was not his intention to deliver up the possession, the commission was granted.

Before the commissioner and jury the evidence given was : that Marshall told a third party in April, 1860, that his time would expire on the 1st of July, then following, 1860.

On Marshall's part his father was called as a witness, who swore that in April, 1860, " Woodbury and the tenant (his son) talked of a second lease ; that Woodbury was to remove a building in rear and put up another, and the tenant was to do certain inside work, and to have the premises for *three* years, at a rent of £75 per annum ; the tenancy was to commence at the expiration of the then tenancy. Woodbury did not do what he agreed to do, and matters" (the witness stated) " are the same now."

The commissioner considered that this agreement spoken of by the witness not being in writing was void by the statute of frauds.

The commission issued on the 13th of July, 1860. The jury found, on the 21st of August, 1860, in the words of the statute, that Marshall was tenant to Woodbury and wife for a term which had expired, and that he wrongfully refused to go out of possession, having no right or colour of right to possession.

A jury was first called for the 13th of August, on which day it was adjourned by written consent of counsel for both parties to the 21st of August, on account of the illness of the commissioner.

It appeared on the proceedings returned, that a jury had been called before the 13th of August, to sit on this case, and not being able to agree were discharged, and a second precept issued, and a new jury impanelled, which found as has been stated. Before Marshall went into his defence before this second jury, his counsel objected that this second proceeding of the commissioner was illegal, but the judge overruled the objection.

Marshall, on moving for this rule *nisi*, filed an affidavit, in which he swore that Woodbury offered the premises to him

for one year or three, at his, Marshall's, option, and that he accepted them for three years: that afterwards they agreed that the time should be extended to three years from the expiration of Marshall's first year, without any condition; and it was further agreed that Marshall should make certain improvements during the extended time, the greater part of which he did make; and the cost was to be set against his rent proportionately in each of the three years of the extended time, which agreement could not be carried out if he was ejected from the premises.

It did not appear that Marshall gave any proof of this before the inquest.

Anderson shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We do not think that the proceeding necessarily fell through because the first jury could not agree, but that the commissioner could legally summon another jury, and hold an effectual inquisition, just as if one of the jury on the first occasion had become incompetent to act from sudden illness.

Then as to the case not being one coming properly within the intention of the Ejectment Act, Consol. Stats., U. C., ch. 27, sec. 63, on which account we are moved to set the proceedings aside under the 69th section:—

The case was a perfectly plain one, as it was made to appear before the commissioner. There was only a talk of a further term, provided certain things were done by the landlord, which he did not do, and no further term was granted. The commissioner rightly held that that was only an alleged verbal treaty or agreement about a lease, which came to nothing, and which as an agreement was void by the statute of frauds, because not in writing.

The tenant's father was examined before the inquest, and gave that evidence. Now the tenant himself makes an affidavit and states that an extension of the time was granted without any condition, which the landlord on oath denies.

We think we should not now interfere with what has been done.

Rule discharged.

ORR V. SPOONER.

Malicious prosecution—Application to set off judgment—Assignment of plaintiff's verdict—Second new trial refused—Justice of the peace—Proof of malice.

The plaintiff had obtained a verdict against defendant in an action for malicious prosecution, but had not yet entered judgment, leave being reserved to move, and defendant, in moving for a nonsuit or new trial on the evidence, asked also to be allowed to set off a judgment which he had obtained against the plaintiff against that to be entered on this verdict, consenting in that event to waive his motion against the verdict. The court granted the application, notwithstanding an assignment of such verdict, which was alleged to have been made between the trial and term by the plaintiff to a third party in satisfaction of a debt.

The defendant was a justice of the peace, and in the course of his duty as such acquired his knowledge of the circumstances on which he preferred the charge against defendant. *Held*, that he was clearly not entitled as a magistrate on that ground to require that express malice should be proved against him.

A second new trial was refused, though the verdict appeared to be against the weight of evidence.

This was an action against defendant for maliciously preferring a prosecution against the plaintiff for a misdemeanor.

Plea, not guilty.

At the trial, at Kingston, before *Robinson*, C. J., the case turned wholly on the credibility of the witnesses. The learned Chief Justice intimated to the jury that the evidence appeared to him stronger on the side of the defendant than of the plaintiff, but he told them that if they believed the plaintiff's witnesses he was entitled to a verdict, provided they found that, in addition to the fact of the charge against the plaintiff being groundless, the defendant in prosecuting as he did had acted from malice.

Upon this charge they found for the plaintiff, giving £25 damages.

It was objected that the defendant being a magistrate, and having in that capacity acquired the information on which he preferred the charge, express malice must be shewn, but this objection was overruled, leave being reserved to defendant to move to enter a nonsuit.

The jury had found for the plaintiff on a former trial also, giving £50 damages.

R. A. Harrison obtained a rule *nisi* for a new trial on the evidence and judge's charge; or for a nonsuit on the leave reserved; or, upon affidavits, to be allowed to set off a judg-

ment which defendant had recovered against the plaintiff for £23 15s., including interest, in which case he would not desire a new trial.

Richards, Q. C., shewed cause, and cited *Masterman v. Malin*, 7 Bing. 435; *Garrick v. Jones*, 2 Dowl. 157; *Jones v. Thompson*, 4 Jur. N. S. 338; *Hewitt v. Pigott*, 1 Dowl. 250; *Standeven v. Murgatroyd*, 27 L. J., Ex., 425; *Hirsch v. Coates*, 18 C. B. 757.

The facts stated in the affidavits sufficiently appear in the judgment.

ROBINSON, C. J., delivered judgment of the court.

On the whole evidence I am not in favour of granting a second new trial on the weight of evidence. It would be inconsistent, I apprehend, with the principles on which courts usually exercise their discretion in similar cases, though I should not have differed from my brothers on that point if they had thought it more proper to grant a new trial.

The defendant's counsel moved for a nonsuit at the trial, and has applied for it in term, but it was not pressed on the argument of the rule *nisi*, and we are clear that there is no ground for it. The point taken was that the plaintiff was bound to give evidence of express malice on the part of the defendant, or must fail in his action, because the defendant is a justice of the peace. But the defendant is not attacked in this action for any thing done by him as a magistrate. He was a private prosecutor in promoting the charge upon which he procured this plaintiff to be indicted, and though it was in the course of his duty as a magistrate that he acquired a knowledge of the circumstances on which he founded the criminal charge against the plaintiff, yet he was not acting officially as a justice of the peace in preferring that charge.

As to the application by the defendant to be allowed to set off the judgment which he has obtained against the plaintiff against the judgment to be entered in this cause, it is one which upon view of the affidavits we should certainly desire to accede to, if it be in our power.

It is objected that it cannot be done, because the plaintiff has not yet a judgment against the defendant, and the

case of *Garrick v. Jones*, (2 Dowl. 157,) is cited by the plaintiff.

In that case, however, it appears to have been the persons who had obtained the verdict only, on which no judgment in their favour had yet been entered, who were applying to have their verdict set off against the judgment of the other party; but the court held that it could not be done, because a motion for a new trial was then pending, and the verdict might not be confirmed, and in that case they said the party who had judgment might be deprived of the fruits of it without any corresponding advantage.

Here the party holding the judgment—that is, the defendant, Spooner—is willing to acquiesce in the judgment against himself, and to abandon all grounds he may have for moving against it, if the court will allow his judgment against the plaintiff, Orr, to go in discharge of so much of the verdict and costs as the amount will cover.

The cases are very different, and in reason it can be no objection, we think, to the defendant's application, that judgment has not yet been entered on the verdict *against him*. His motion is that on the entry of judgment against him the deduction may be made, so that the judgment may be satisfied on his paying the balance that will remain due to the plaintiff in this case, with the costs.

The defendant's application, however, is further resisted on this other ground—that the plaintiff has assigned his verdict against the defendant, and all the demand he can establish under it, in satisfaction of a debt of his to one Reid. We do not think the alleged assignment ought to be allowed to defeat this application. The verdict was rendered on the 10th of May, and the plaintiff swears that he assigned it by a deed *bearing date* on the 14th of May, which deed he produces. There is much reason to believe from the affidavits that the assignment is merely a contrivance to defeat any such application, but that is denied by the plaintiff upon oath, and by Reid, and whatever might be our impressions we could not assume the defendant's belief of that fact to be well founded, and act upon his affidavit as a proof of it. Still it remains to be considered whether we ought to recog-

nize any interest in Reid under the assignment of the verdict made in the short interval between the trial and the term, against which verdict, moreover, the defendant had leave reserved to him to move. Our opinion is that we should not suffer it to stand in the way of so just an arrangement as is desired on the part of the plaintiff.

Rule absolute to set off defendant's judgment.

DAWES V. WILKINSON.

Bond—Condition in restraint of trade—Verdict subject to award—Motion to arrest judgment.

The plaintiff sued defendant on a bond conditioned not to commence business as an hotel-keeper within three years in a certain township. At the assizes the case and all matters in difference between the parties in connexion with it were referred. A verdict was taken for the penalty subject to the award, and a memorandum of reference endorsed on the record, signed by the attorneys. By this minute power was given to the arbitrator to examine the parties and their witnesses, certify for costs, and amend the pleadings; but it contained no agreement not to bring error, and no rule of reference had been drawn up. An award having been made in favour of the plaintiff, defendant moved to arrest judgment, on the ground that the condition was void, being in restraint of trade.

The application was refused, on the grounds that the arbitrator might for all that appeared have decided the point now raised, as he had power to do, or the award might have been upon some other matter connected with the contract.

Held, no rule of reference having been drawn up, that it could not be assumed that defendant had referred on the ordinary condition not to bring error.

Held, also, that if the motion had been after verdict, without a reference, defendant must have succeeded, for the contract being in restraint of trade it was necessary to shew a consideration, and none appeared in the declaration.

The plaintiff sued defendant on a bond, with a condition that defendant should not commence business at any time within three years as an hotel-keeper in the township of Whitby, charging a breach of it.

Defendant pleaded,—1. *Non est factum*, and 2. Traversing the breach of the condition.

At the assizes the parties consented to a reference, and the attorneys on each side signed the following memorandum on the back of the *nisi prius* record, which was also signed by the judge.

“We hereby consent to a verdict for the plaintiff for £1000 (that being the penalty of the bond) subject to be reduced, or a verdict entered for defendant, by the award of

Zaccheus Burnham, Esquire, the judge of the county court, &c., to whom the within issues, and all matters in difference between the parties in connexion with the suit, are referred, with power to the said arbitrator to examine witnesses and the parties hereto on oath, and to certify for costs, so as the said award be made in writing, ready to be delivered to either of the parties, on or before the first day of March next, with same power also to said arbitrator to amend the pleadings as the judge at *nisi prius* would have."

No rule of reference had ever been drawn up on this submission.

An award having been made in favour of the plaintiff:

Anderson moved to arrest the judgment, on the ground that the condition was void, as being in restraint of trade. He cited Ch. Plg. I. 380; *Hutton v. Parker*, 7 Dowl. 739; *Smith on Cont.* 180; *Add. on Cont.* 101; *Chy. on Cont.* 585; *Hitchcock v. Coker*, 6 A. & E. 438; *Russ. on Awards*, 81.

Richards, Q. C., shewed cause, and contended 1st. That the condition was not void. 2nd. If it were necessary that a consideration for such a contract by bond should appear, and if defendant was at liberty to move after the reference to arbitration, then he asked leave to suggest the consideration, and go to trial upon it if necessary. But he contended that defendant was not at liberty to move in arrest of judgment; and he insisted that defendant, if he could move before a proper rule of reference had been drawn up, should be intended to have referred on the ordinary terms, not to bring error, &c. He cited *Homer v. Ashford*, 3 Bing. 322; *Mallan v. May*, 11 M. & W. 665.

ROBINSON, C. J., delivered the judgment of the court.

If the question of the validity of this bond had been raised by demurrer, or if the case had gone to trial and a verdict been given in favour of the plaintiff, and the defendant had moved to arrest judgment, we must have held the declaration bad, because it discloses no consideration for the contract, which is in restraint of trade, and which, according to a long train of decisions, following the admirable judgment

given by *Parker*, C. J., in *Mitchel v. Reynolds* (1 P. Wms. 181,) must be held void in the absence of any appearance of a consideration to support it. It does not on the first impression appear very obvious why a consideration, and even a very slight one, should render that legal which without it would be held void as being against public policy, but the law is clearly so settled, and this is plainly a case within the current of authorities, as Mr. Richards candidly admitted.

We have therefore only to consider the effect of the verdict not having been rendered by the jury, but being a verdict merely conditional and formal, and being liable to be reduced or vacated altogether by the award of an arbitrator. We see that the award was to be made by the terms of the memorandum by March last, and it appears that it has been made in favour of the plaintiff. The case therefore resembles *Chownes v. Brown*, (2 D. & L. 706,) in which we may infer from the short report of the case that judgment would have been arrested, if the defendant had not by the terms of the reference been restrained from bringing a writ of error. Now here there is no rule of reference containing such a restriction, and in fact no rule at all. It has been urged by the defendant's counsel as reasonable, that if there be no such rule of reference before us the defendant should not be looked upon as in a condition to call upon the court to arrest the judgment, because we do not see under what terms the parties are as to bringing a writ of error, and they may be for all we know restrained ; or that, if there be no rule before us, we should assume that the parties referred upon the ordinary terms of agreeing not to bring error, and so not to allow the same end to be attained, and by a shorter course, by moving in arrest of judgment.

But to that we cannot we think accede, because we do see the terms on which the parties submitted, and as they do provide for almost every thing usual in such cases, we should, we think, infer that that minute contains all that they stipulated for or assented to ; and the endorsement on the record is silent as to bringing error.

But there are difficulties which we feel to be in the way

of acceding to the application to arrest the judgment. In the first place, the submission is not of the action only, but of all matters in difference between the parties in connexion with it. It may be a matter in difference between the parties whether the bond is void or not as being in restraint of trade, and if so the arbitrator had power to determine upon that, as well as upon matters of fact; and, in the next place, the award in favour of the plaintiff may have been on some other matter, though having a connexion with that contract.

On the whole, we do not see our way clear to arresting the judgment, and we therefore discharge the rule, leaving the party to his writ of error, if he chooses to persevere in the objection.

Rule discharged.

COWAN ET AL. V. MCINTYRE ET AL.

Misjoinder of defendants—Amendment at trial.

In an action on a bill of exchange accepted by a firm, the name of one defendant, who it appeared was not a partner, was struck out at the trial, and the amendment was afterwards held by the court to have been proper.

This was an action on a bill of exchange drawn by the plaintiff, on the 3rd of February, 1860, on Messrs. McIntyre & Company, payable to plaintiffs' order, in thirty days, for \$158.12. It was averred that the defendants, under the name and style of McIntyre & Co., accepted the bill, but had not paid it.

The defendants pleaded that they did not accept the bill.

On the back of the bill was written "Accepted," McIntyre & Co., per A. McIntyre."

The action was against Malcolm McIntyre and Alexander McIntyre, the latter being the person who wrote and signed the acceptance.

At the trial, at Kingston, before *Robinson*, C. J., the defendant Alexander McIntyre swore that he was a clerk of the other defendant, not a partner with him; and his name had been joined, as was alleged by the plaintiffs' counsel, on the supposition that he was a partner with his brother, the other defendant. The learned Chief Justice, on the

application of the plaintiffs' counsel, allowed his name to be struck out of the record, and a verdict was rendered against the other defendant for \$161.48.

The defendants' counsel objected to the amendment, contending that the plaintiffs must be nonsuited, and leave was reserved to the defendant Malcolm McIntyre to move for a nonsuit on this ground.

R. A. Harrison obtained a rule *nisi* accordingly. He cited *Robson v. Doyle*, 3 E. & B. 396; *Greaves v. Humphries*, 4 E. & B. 851; *Tulloch v. Wells et al.* 8 C. P. 394.

McLennan, shewed cause, and cited *Greaves v. Humphreys*, 1 Jur. N. S. 473; *Johnson v. Goslett*, 18 C. B. 728; *Wickens v. Steel*, 2 C. B. N. S. 492; *Holden v. Ballantyne et al.*, 6 Jur. N. S. 451.

ROBINSON, C. J., delivered the judgment of the court.

We think it clear that the amendment could be made, in the discretion of the judge, and that there was no good reason in the facts of the case why it should not have been made. The plaintiffs had sued both the brothers under a misconception, into which they fell naturally enough, though the addition of "per A. McIntyre," to the acceptance by McIntyre and Company, might have warned them against it. In the hurry of business such an oversight might easily happen. It is not pretended that there was any other person who could have been joined with Malcolm McIntyre as partner in the firm; and as the plaintiffs took the acceptance from Alexander McIntyre, whom they saw managing the business, his brother being resident in another part of the country, they concluded that he and his brother were partners.

There is no pretence for supposing that the plaintiffs deliberately endeavoured to fix him with liability in what they knew or believed to be a doubtful case. The judgment of our court of Common Pleas, in *Tulloch v. Wells et al.*, (8 C. P. 394,) and the case of *Wickens v. Steel*, (2 C. B. N. S. 488,) are, when the circumstances are considered, in support of what was done in this case at the trial, and not in opposition to it.

We refer also to *Johnson v. Goslett*, (18 C. B. 728,) and *Greaves v. Humfries*, (4 E. & B. 551.)

The rule is therefore discharged.

Rule discharged.

McLAREN ET AL. V. MORPHY.

Ejectment—Statute of Limitations—Interruptions of possession.

In ejectment the plaintiffs proved a paper title to the land in question, which the defendant, the heir at law of the patentee, claimed by possession. It appeared that one B., in the spring of 1834, took possession of an acre of the same lot, which he agreed to purchase from one M., through whom the plaintiffs claimed, and built a house on it, in which he lived till 1844. The land in dispute lay between his acre and the river, and he was allowed to occupy and enclose it by the owner, whose title he always acknowledged, though not in writing. He left in 1844, and his house continued vacant for two years, the land in question remaining enclosed as before. The house and acre were then taken by a tenant under B., and occupied for three years together with this land, and after being vacant for three months two other tenants came in succession, and occupied the house until June, 1855, holding this land in the same way as B. and the others had done, when the defendant brought ejectment for the house and acre, and having recovered a verdict, took possession of the land in question as well.

Held, that the possession of B. and those succeeding him must be treated as continuous, notwithstanding the breaks in the occupation, and that a verdict was properly found for defendant.

B. having entered with the consent of the owner was tenant at will, so that the statute began to run at the expiration of a year; and the evidence shewed possession for twenty-one years.

EJECTMENT for part of the north-east half of lot 14, in 12th concession of Beckwith.

At the trial, at Perth, before *Draper*, C. J., it appeared that on the 11th of June, 1824, the Crown granted the land in dispute, with other lands, by letters patent, to William Morphy, father of the defendant.

On the 17th of January, 1826, the patentee conveyed the lands mentioned in the patent to Hugh Boulton.

On the 14th of April, 1841, and 12th of April, 1850, Hugh Boulton conveyed parts of this land to Alexander McLaren, who, by his will dated the 27th of January, 1852, devised the same land to the plaintiffs—a brother, two nieces, and a nephew of the testator.

The land sought to be recovered in this action was a small piece on the bank of the river Mississippi, containing about

26 square poles, forming part of the north-east half of lot 14, in the 12th concession of Beckwith, to which the plaintiffs proved title at the trial as has been stated.

The defendant, who was the son and heir-at-law of William Morphy, the patentee, contended that the plaintiffs were barred by the statute of limitations.

Upon that point the following evidence was given :

The Rev. E. Boswell swore that he had lived in Carlton place (on the Mississippi) up to July, 1844, and that he had contracted to buy an acre of land from Alexander McLaren, the testator, and went into possession of it and built a house upon it, in which he lived. The small piece of land now in dispute lay between his house (on this acre) and the river. Mr. Boswell occupied this house in the spring of 1834, and from that time till he left the place, in July 1844, he was allowed as a favour by Hugh Boulton (who then owned the adjoining land) to occupy this small piece of land lying between his house and the river. He fenced it in and made use of it, having, as he stated, no title to it, and having no thought of acquiring a title, but merely occupying it by the kindness of Boulton, whose title he constantly acknowledged, though not otherwise than verbally.

After Mr. Boswell left that part of the country, which he did in July, 1844, his house continued vacant for about two years, and this small piece of land remained enclosed with the acre which he had occupied. About two years after the Rev. Mr. Muloch succeeded him in the mission, and lived in Mr. Boswell's house, using the land in question, together with the acre on which the house stood, for about three years, when he went away ; and about three months afterwards the Rev. Mr. Pyne came in his place, and when he left the house one Hallidy went into possession. The two last paid rent to Mr. Boswell, who swore that Mr. Muloch also was his tenant while he occupied, and that they all were in possession as he had been of the piece of land in dispute, lying between his house and the river.

Morphy, the grantee of the Crown, died, as Mr. Boswell stated, before he got a title from him for the acre on which the house stood, and the defendant as his heir brought

ejectment against Mr. Boswell in 1855, and ejected him from that acre. The sheriff put defendant in possession in June, 1855, and he had remained in possession ever since of the house and acre lot, and also of the small piece of land now in dispute.

It was proved that Mr. Boswell inclosed the small tract in dispute in 1834, nearly 26 years before the trial, and got a crop of potatoes from it in that year.

It appeared, then, that he and those who followed him in the possession, by his permission, and under a license derived from Boulton, had occupied that piece of land from May or June, 1834, to the 14th of June, 1855, when this defendant, having recovered the house and acre of land in an action of ejectment against the last of such occupants under Boswell, had ever since held possession of this small piece inclosed with it.

It was contended on the part of the plaintiffs, devisees of McLaren, who bought from Boulton, that the statute did not run during the two years that the place remained unoccupied after Mr. Boswell left it.

The learned Chief Justice held, that upon the evidence Mr. Boswell's possession must be looked upon as continuing, though the house was vacant, and that there was a continued dispossession of the persons holding the legal estate from the time when Mr. Boswell entered in 1834, till he was finally dispossessed by the ejectment on the 14th of June, 1855. He held that Boswell was sufficiently in possession during the time when the place remained unoccupied, between his leaving it and Mr. Muloch's entry, to enable him to maintain trespass against any mere wrong-doer not holding under Boulton's title.

The jury, thereupon, found for defendant.

Prince obtained a rule *nisi* for a new trial on the law and evidence, and for mis-direction as to the effect of the possession, which it was proved had been held against the plaintiffs; and on affidavits.

Deacon shewed cause, and cited *Doe v. Reade*, 8 East 356; *Doe Perry v. Henderson*, 3 U. C. R. 486.

ROBINSON, C. J., delivered the judgment of the court.

There is nothing stated in the plaintiffs' affidavits which would warrant the granting a new trial, after those which have been filed in answer are considered.

There is no other question in the case than the sufficiency of the evidence to support the verdict for the defendant; and this depends, first, upon the length of time that the plaintiffs and those under whom they claim can be said to have been dispossessed, supposing there had been no break in the actual occupation of the small piece of land in question after Mr. Boswell first inclosed it; and, secondly, on the effect of the alleged interruption of the possession held by Mr. Boswell, and by others with his permission.

As to the duration of the possession, without at present noticing the alleged interruption, the jury were rightly told that as the commencement of Mr. Boswell's possession was clearly with the permission of Mr. Boulton, the then owner, he could only be looked upon as tenant at will, and the Statute of Limitations in consequence could not commence to run till the expiration of a year, so that it was necessary to shew that twenty-one years had elapsed between Mr. Boswell's entry and the bringing of this action.

On that point the evidence cannot be said perhaps to be quite certain and decided, though Mr. Boswell himself and the witness Robert Knox gave such account of the time of inclosing the premises, and of the subsequent occupation, as left little or no room for doubt that the twenty-one years had fully elapsed.

If the evidence at the trial had not so clearly preponderated in favour of that conclusion, we ought still to have hesitated to disturb the verdict, for there was no misdirection. The tract of land for which this action is brought is of very trifling extent, less, we think, than the sixth part of an acre. There was no evidence that there are any particular circumstances which give it great value, except to the owner of the adjoining acre, with which it had for so long a period been allowed to be inclosed.

Then as to the alleged interruptions in the occupation after Mr. Boswell had left that part of the country we do

not think that the learned Chief Justice erred in the view which he took of the evidence on that point. There were two breaks in the actual occupation of the house and acre, with which this action has no concern, and while they were vacant the small piece which is in question in this action was not made use of by any one, but continued to be inclosed under the same fence as the acre; and the question is whether the real owner of that land can properly be held to have been dispossessed of it during the two years, or about that time, which elapsed between Mr. Boswell's leaving the mission and Mr. Muloch's taking possession of it, and occupying the same house and the field which included this piece of land, and also during the three months that intervened between Mr. Muloch's departure and Mr. Pyne succeeding him. The whole field was then, as well as during the rest of the twenty-one years, appurtenant to the house. It remained fenced in with it, and the house itself was locked up, as any proprietor would leave his house locked up during a temporary absence, or while it continued vacant from any other cause.

The facts do not warrant the supposition that the field was abandoned by Mr. Boswell any more than the house, for Mr. Muloch, when he came and took possession of the house, took also possession of the land, and so did all who followed as tenants of Mr. Boswell, paying him rent for the whole.

Mr. Boulton had kindly allowed the land to be held by the clergyman with the acre which he held under Morphy. It gave the occupant of the house access to the river, which no doubt was a great convenience. He was to let Mr. Boswell have it till he, Boulton, should want it for the purpose of a mill, and he never seems to have given evidence within the twenty-two years that he desired it for any such purpose.

Under the provisions of the statute we think a possession so allowed to be held for twenty-one years will ripen into a title, unless it can be shewn that rent has been paid, or the title of the true owner acknowledged in writing by the occupant within the twenty-one years; and in our opinion the circumstance that within twenty-one years Mr. Boswell

was not residing in the house or using any part of the field did not prevent the statute running without a break, when he resumed possession by his tenants. The true owner was excluded from possession by the inclosure, as it seems that Mr. Boswell was all the time allowed to assume and exercise dominion over the house and field.

The recovery in ejectment by Morphy, this defendant, against Mr. Boswell in 1855 signifies nothing, for that was of the house and acre only, as it appears, though possession was in fact taken of this piece of land at the same time, and the time of this defendant so holding it against the true owner would of course count as part of the period during which the plaintiffs and those through whom they claim were dispossessed.

The case of *Doe v. Reade*, (8 East 356,) cited on the argument, is not applicable, for the circumstances were altogether different from the present. If in this case the plaintiffs or their devisor had entered upon the premises while they were vacant, and before twenty-one years had expired, then the statute would have ceased to run, for Mr. Boswell could not have been looked upon as being in possession while the house and land were occupied by another.

It is not necessary to consider what might have been the effect of the plaintiffs entering after the twenty-one years had expired: that is, whether they would have been liable to be dispossessed by an action brought by the person last in peaceable possession, for there has been no such union of actual possession with the title since 1834.

In our opinion the rule should be discharged.

Rule discharged.

WEBB V. PORT BRUCE HARBOR COMPANY.

*Harbor company—Liability for obstructions to entrance—Consol. Stats.
U. C. ch. 50.*

Defendants, a Harbor Company, incorporated under the Consol. Stats. U. C. ch. 50, constructed two piers running out into Lake Erie, and had for some time collected tolls upon vessels, though it was said that the harbor was not finished, and that it was intended to carry the piers further out. The plaintiff's vessel, bound for another port, met with an accident, and having attempted in consequence to enter this harbor, was wrecked upon a sand-bar which had formed about two hundred feet outside of the piers, and the cargo was lost. It appeared that this sand-bar was of a shifting nature, disappearing and forming at different times, but it was proved that defendants some weeks before the accident had begun to remove it, and had not gone on with the work. The jury having found that the loss was caused by defendants' negligence,

Held, that defendants were liable, and the verdict for the value of the plaintiff's cargo was upheld. *McLean, J.*, dissenting.

DECLARATION.—That defendants are a joint-stock company, formed according to the provisions of the act of parliament for the formation of joint-stock companies for the construction of piers, wharves, dry docks, and harbors, for the purpose of constructing piers and wharves, and making and dredging a harbor at the mouth of Catfish Creek: that defendants, in pursuance of the purpose for which the company was formed, in 1854 constructed piers and wharves, and dredged a harbor at the mouth of Catfish Creek, and by reason thereof, and in pursuance of the powers conferred by the act of parliament, levied tolls upon vessels frequenting the harbor, and upon the cargoes of such vessels: that by reason of the premises, after constructing the harbor and levying tolls it became and was the duty of the defendants to maintain and keep the harbor in reasonable repair, and free from sand-bars and obstructions to the free and convenient entry of the said harbor by vessels capable of entering the same: that for a long time before, and on the 2nd of November, 1859, the defendants, neglecting their duty, carelessly and negligently allowed the harbor to become and be obstructed by a sand-bar, and wrongfully, and contrary to their duty, did not remove the same within a reasonable time after the formation thereof, whereby the harbor on the day aforesaid was obstructed by the said sand-bar: that the plaintiff on that day had on board a vessel called the "Constitution," navigating Lake Erie, a quantity of coals, to wit,

139 tons, of the value of \$800, which vessel, on entering the harbor with the coals, stranded on the sand-bar, so wrongfully and contrary to the defendants' duty left there, by reason of which stranding of the vessel 126 tons of the said coals were wholly lost to the plaintiff.

Pleas.—1. Not guilty. 2. That the coals were lost through and by means of the negligence of the plaintiff, and those in charge of the same, and not through or by reason of any breach of duty of the defendants in the construction of the harbor, or in the safety or efficiency thereof.

The trial took place at London, before *Richards, J.*, when the facts proved were these :

The harbor was constructed by two straight piers built out from the land at the mouth of Catfish Creek to the south, and extending about 500 feet from the land into Lake Erie. In 1856 the place began to be used as a harbor, and the company levied tolls, but the harbor was not yet finished, as it was said that piers must be extended still further to render them serviceable for the purpose of a harbor. Inside the piers, which in fact formed the east and west sides of the harbor, there was from ten to eleven feet of water. Some six weeks or two months before the vessel in question stranded, a sand-bar had formed in the shape of a semi-circle, from about 150 to 200 feet beyond the end of the piers, being so much farther into the lake, and forming a bar to the entrance between the piers. That bar had been caused by the action of the winds on Lake Erie, and indeed was said to be common to all the artificial harbors on that side of the lake. It was also proved that as much sand collected in a few hours as it would take weeks afterwards to remove, and such bars were formed very suddenly. The depth of water between the bar and the end of the piers varied from eight feet near the bar to twelve feet at the end of the west pier, and on the 1st of November, 1859, the depth of water on the bar was said to be $7\frac{1}{2}$ feet. The distance between the piers was only 110 feet clear. This seemed to have been the state of affairs with regard to the harbor at the time of the accident.

The schooner "Constitution" was about 100 tons burthen, an old vessel, and then employed in the coal trade. She sailed

from Cleveland on the 1st of November for Port Stanley, laden with 139 tons of coal, and in crossing the lake the wind freshened, and in consequence of the main peak giving way she could not make the harbour of Port Stanley, opposite to which she arrived in the course of the evening. The captain did not try to make Port Burwell, for he said he knew there was not depth of water sufficient to admit of the vessel entering, and so he bore away to endeavour to enter Port Bruce to escape the storm. He had never been in the Port Bruce Harbor, and did not know the depth of water or state of the harbor. One of the crew reported that he had been in there during the course of the previous summer, and thought there was 11 feet of water to the entrance of the piers. The Constitution arrived opposite Port Bruce at 9 o'clock in the morning of the 2nd of November, the sea at the time running high. The vessel drew $7\frac{1}{2}$ feet of water at the time, and running in for the entrance between the piers, she grounded on the bar, and swung round and at length broached to after getting over the bar, but missed the east pier, passing about 40 feet from it, and went ashore. At that time nothing could be done to save the cargo, but directions were given by those who seemed interested in such matters to give notice when the wind should abate, and that exertions would be made to save the cargo, and the master of the vessel was directed to set a watch for the purpose. He neglected doing so, and consequently much time was lost, and when the parties did set about saving the cargo they had only time to save 13 tons before the wind again rose, after which the vessel went to pieces, and the remainder of the cargo was totally lost. It was said that if a watch had been set as directed, to give notice of the lull of the wind, nearly if not the whole of the cargo might have been saved.

A question was made whether the master and crew managed the vessel properly, and whether they might not have forced the vessel over the bar into deep water, if they had adopted the system of increasing instead of shortening sail as the vessel grounded. People were standing on the pier giving signals to induce the crew to force the vessel on.

With respect to the evidence of neglect of the duty

charged against the defendants, it was proved that other vessels before this had difficulty in getting into and out of the harbor, and that two of the directors of the company must have known this. The day after the accident a vessel in the harbor had much difficulty in getting out. Then evidence was given that men had been set to work to clear the bar, but had given it up, the difficulty being that a few hours would fill up what took them weeks to remove. The master of the vessel stated that after the accident he conversed with one of the directors, who informed him that he was aware about four weeks before the accident of the existence of the bar: that the directors had held a meeting on the subject, and had agreed to pay a man \$40 to remove it; that the man worked half a day and then left. This director said he knew it was carelessness to leave it there, and that if he had been aware of the existence of the bar before, he should himself have taken steps to have had it removed. All this evidence about what passed in conversation with the one director was objected to on the part of the defendants, on the ground that the statements of an individual director could not bind the company so as to charge them with breach of duty.

No evidence was given to shew whether any by-law establishing tolls would oblige this vessel only attempting to go into Port Bruce for shelter to pay toll either on vessel or cargo. The cargo was consigned to Port Stanley, and of course deliverable there. The vessel might have run for Long Point, a distance of some 20 to 30 miles, and have obtained shelter, instead of attempting to enter Port Bruce.

The defendants offered no evidence, but moved for a non-suit on the ground that upon these facts the defendants were not liable to an action. The learned judge reserved leave to the defendants to move the court to enter a verdict for them, if the court should be of opinion that upon the evidence the plaintiff was not entitled to recover; and subject to that he left it to the jury to say whether in fact the sand-bar upon which the vessel struck was or not part of the defendants' harbor, and if so, whether they were aware of the existence of the bar, and allowed an unreasonable time

to elapse before attempting to remove it. It was also left to the jury to say whether the master exercised proper judgment in attempting to enter the harbor at that season of the year with a cargo of the kind he had, and considering his want of knowledge of the nature of the place, depth of water, &c., and depending upon the casual information derived from one of his crew; and also whether there was mismanagement of the vessel when she grounded; and the jury were told that if the master acted negligently and carelessly the defendants were not liable. Further, it was left to them to say whether the master acted with reasonable care and diligence in saving the cargo, and they were directed that if he did not the plaintiff could not recover.

The jury found a verdict for the plaintiff for the value of the 126 tons of coal lost, \$453 60.

Prince obtained a rule to shew cause why a verdict should not be entered for the defendants, pursuant to the leave reserved.

J. Wilson, Q. C., shewed cause.

Becher, Q. C., and *Prince* supported the rule, citing 16 Vic., ch. 124; Consol. Stats. U. C. ch. 50; *Jenkins v. Port Burwell Harbor Co.*, R. & H. Dig. p. 358; *Metcalf v. Hetherington*, 11 Ex. 257; *Walker v. Goe*, 3 H. & N. 395; *Gibbs v. The Trustees of the Liverpool Docks*, Ib. 164.

ROBINSON, C. J.—The case does not, upon the pleadings, afford room for the question whether the defendants are liable, there being no statement in the declaration that toll was paid, or could have been demanded for entering the harbor, if the plaintiff had passed the bar, but merely a general statement that the defendants levied a toll, under powers given to them by statute, upon vessels frequenting their harbor, and upon the cargoes of such vessels; and the plaintiff avers, that on a certain day he was entering the harbor, with a cargo of coals belonging to the plaintiff, when the vessel stranded upon the bar, which had been allowed to accumulate and remain from the defendants' negligence, and his coals were thereby lost.

The defendants, in answer, plead only not guilty, which denies the negligence; and, secondly, that the coals were lost by the negligence of the plaintiff.

The defendants have power, by the Consol. Stats. U. C., ch. 50, secs. 1, 22, 30, to impose toll on vessels entering their harbor. If this vessel had got in, so that she received shelter, toll might be justly demandable, in the absence of any proof to the contrary, although she was seeking the harbor for refuge only, and not with intent to land passengers or cargo. It did not appear what by-laws or regulations had been made by the defendants in that respect. The case was rested on other grounds by the pleadings and evidence than that the defendants would not be liable by reason of having no claim to be remunerated for the use of their harbor, if the vessel had succeeded in entering.

The bar, I think, according to the evidence, was part of the harbor, within the intention of the act, and for the purposes of this action. The very intention of the association of the defendants must have been to provide safe and convenient access for vessels, by removing the bar at the entrance, or at the least dredging it, so as to obtain a sufficient depth of water. They had been used, it appears, to do so; and it was left to the jury whether they had not, at the time in question, neglected it; and the jury found they had, and they so found, I think, on evidence that warranted it.

It is true that it does seem that if the bar had been removed only a few days before, it might, in case of particular winds blowing, have filled up again just before the time in question, so that it could not have been opened by reasonable exertion at that time. But we do not know how that would have been in fact; all that does seem to have been proved, is that the bar had been left for some weeks, when it might have been removed; and continued to be neglected till this loss occurred, and that the defendants were conscious of remissness on their part.

Then as to the vessel being old and leaky; she perhaps drew more water than if she had been staunch and dry, but she does not appear to have drawn more water than the

plaintiff might have expected in the ordinary course to find there, or than there commonly was when the entrance to the harbour was kept clear; and as to the vessel being old, that, I think, would be no excuse, either as against the owner of a vessel or cargo seeking compensation. For all that appears, she would have got in as well as a new vessel, if she had not struck on the bar, and though after she struck she perhaps went to pieces sooner than a new vessel would have done, or went to pieces when a sound vessel might have held together and preserved the cargo, yet that was all for the consideration of the jury, so far as it was important; and all the facts calling for their consideration were fairly submitted to them.

I have more doubt on the evidence that was given of the neglect of the people on board to profit by the calm time that there was in the night for getting out the cargo, than on other points in the case, but that also was fairly submitted to the jury. The evidence went only to the effect that *more* of the cargo might have been saved, and perhaps all. On the whole, I cannot say that the verdict is altogether satisfactory, yet I see no ground on which I think we could properly set it aside and enter a verdict for the defendants, which is what we are asked to do, or to grant a new trial.

The case cited of *Gibbs v. the Trustees of the Liverpool Dock* (3 H. & N. 167) bears strongly in favour of the plaintiff. It was not shown upon the trial that the defendants would not have been entitled to toll, if the vessel had entered; and on the record the duty is not denied, but only the neglect. By professing to have and maintain a harbor for the reception of vessels, and charging toll upon vessels resorting to it, the defendants, in effect, invite mariners to the use of the harbor, and are bound to be careful in removing obstructions, and also to warn all persons, so far as they can, of the harbor being inaccessible, when it happens from any circumstance to be so.

McLEAN, J.—The defendants' harbor was constructed under the provisions of the act, Consol. Stats. U. C., ch. 50, entitled "An Act respecting Joint-Stock Companies for

the construction of Piers, Wharves, Dry Docks and Harbors," and under the 22nd section of that act the president and directors of the company had authority, subject to the approval of the governor, to fix and regulate, from time to time, the tolls, rates, dues, or wharfage, to be received from vessels entering their harbor, or lying at their pier or wharf, and for loading and unloading goods, &c., *in such harbor*. The plaintiff's vessel had an undoubted right to seek shelter in the harbor, and the master would be bound to pay for *entering* the harbor, whether for the purpose of shelter or for the purposes of trade, any charge fixed for such entry according to law; but to entitle the defendants to claim any tolls or dues the vessel must actually *enter their harbor*; that is, it must be actually within that part which affords accommodation and shelter to vessels. The plaintiff's vessel had not reached that point, and at the place where she struck the sand-bar no tolls or dues whatever could have been exacted from her. Then were the defendants bound to remove obstructions outside of their harbor, or in default of doing so were they liable for damage occasioned by such obstructions? As a matter essential to the interests of the company, it was no doubt the duty of the directors to render their harbor as easily accessible as possible, and to remove any obstacles which interfered or were calculated to interfere with the entry of vessels into it, but I cannot see that any duty is imposed upon them to remove sand-bars at the distance of two hundred feet or yards from the extremity of any part of their works. The fact of a vessel being able to come to such a sand-bar, and to lie there at any time, without paying a penny to the company, I think shews clearly that the place occupied by such sand-bar forms a part of the lake, which it is free to any one to navigate, and if so, then did any duty rest on the defendants to remove an obstacle lying in the lake, which injuriously affected the entrance of the harbor?

I have not been able to see that any such duty rested on the defendants, for if they can be held responsible for not removing a sand-bar at the distance of 200 feet from any part of their works, they may be equally responsible for

consequences arising from obstructions double that distance, or at even a greater distance from their works.

In my opinion, the verdict for the plaintiff is wrong, and a verdict should be entered for defendants.

BURNS, J., concurred with the Chief Justice.

Rule discharged, *McLean*, J., dissenting.

IN THE COURT OF ERROR AND APPEAL.

THE SAME CASE—AFFIRMED ON APPEAL.

Per Draper, C.J.—By beginning to receive tolls, the company must be taken to assert that their harbor is capable of receiving and sheltering vessels of such size as it is fitted for. This includes the approach to the harbor; and if afterwards an obstruction from natural or other causes renders it within their knowledge unsafe to attempt an entrance, they are bound either to remove the obstruction, or to close the harbor, by giving notice to the public that it cannot be safely approached.

Hagarty, J., thought the weight of evidence strongly against the plaintiff, but concurred in the judgment, holding that to be no ground of appeal. He considered, however, that the verdict could be sustained only upon that part of the evidence which tended to shew that defendants had undertaken to remove the bar in question; and that if it were a known natural obstruction, outside of their harbor, which they had never professed to interfere with, then they would not be liable.

The defendants appealed from the foregoing decision, and the case was argued in the court above on the 29th of December, 1860. (*a*)

In addition to the cases referred to on the argument below, *Becher*, Q. C., for the appellants, cited *Phelps v. Grand River Navigation Company*, 12 U. C. R. 245; *Stewart v. Woodstock and Huron Plank and Gravel Road Company*, 15 U. C. R. 429; *Regina v. Woodstock and Dereham Plank and Gravel Road Company*, 18 U. C. R. 49; *The Dock Company at Kingston-upon-Hull v. Browne*, 2 B. & Ad. 43; *Gibbs v. Trustees of Liverpool Docks*, 1 H. & N. 439; *Arnould on Ins.* 85; *Arch. Crim. Plg.* 349; *Lan-*

(*a*) Before Robinson, C. J., Draper, C. J., Esten, V. C., Burns, J. Spragge, V. C., Richards, J., Hagarty, J.

caster Canal Co. v. Parnaby, 11 A. & E. 243; Manley v. St. Helen's Canal & R. W. Co., 2 H. & N. 840; Mayor, &c., of Lyme Regis v. Henley, 3 B. & Ad. 77; Chapman v. Rothwell, 1 E. B. & E. 168; Jarvis v. Dean, 11 Moore 354.

C. Robinson, and *Flock*, for the respondent, cited *Marfell v. South Wales R. W. Co.*, 2 L. T. Rep. N. S. 631; *Metcalf v. Hetherington*, Ib. 806; *North Staffordshire R. W. Co. v. Dale*, 8 E. & B. 836; *Rex v. West Riding of York*, 7 East 592; *Barnes v. Ward*, 9 C. B. 420.

On the 23rd of January, 1861, judgment was delivered.

DRAPER, C. J.—I think that by beginning to receive tolls the defendants in effect asserted that their piers, wharf or harbor was so far completed “as to be capable of receiving and sheltering vessels and of safely loading and unloading the same,” for the 30th section of ch. 50, of the Consol. Stats. U. C., gives the authority to demand and take tolls as soon as such pier, wharf, or harbor has reached that state of completion. The schedule includes a small fee on boats, the highest charge being upon boats over fifty tons.

The capability of *receiving* and *sheltering* vessels includes, I think, the approach to the harbor, wharf or pier.

Whether the defendants are to be considered guilty of negligence in allowing a dangerous obstruction to exist and remain at, or how far from, the entrance to the harbor, must be a question under the circumstances for the jury. They have received vessels and collected tolls, and though they do not guarantee thereby that every vessel shall under all circumstances be enabled to enter their harbor safely, they do, I think, hold out to the public that it is reasonably fit for, and reasonably accessible to, all vessels of the class which generally use and frequent such harbors.

If, therefore, after having thus declared that their harbor is capable of receiving and sheltering that class of vessels, an obstruction from natural or other causes renders it within their knowledge unsafe for such vessels to attempt to enter, one of two things in my opinion becomes their

duty, either to remove the obstruction or to close their harbor by giving notice to the public that it cannot be safely approached.

So far as the evidence shews, they undertook the removal of the obstruction, but had not effected it when the accident occurred, which gave rise to the present action. There appears to have been nothing done to warn masters and owners of vessels that the harbor was not as well calculated to "receive" vessels as it had been when the defendants commenced to receive toll. The plaintiff's vessel was of a size certainly not larger, nor drawing more water, than the harbor was calculated to receive, and there was some evidence that the captain was encouraged to enter.

It was suggested that the harbor was not finished: that it was intended to extend the piers farther out; and that when this was done there would probably be no bar of sand forming off the entrance, as is now the case, and owing to which the vessel in question was lost. The power and right to begin charging tolls is not by the statute made dependent on the harbor being completed, but on its being *so far* completed as to be capable of receiving and sheltering vessels. By exercising the power the defendants assert the capacity, and cannot be permitted to set up that they exercised the power too soon.

It was urged in argument, that if the defendants were answerable in this case their liability would have no limit, for if the duty of removing an obstruction *outside* the piers and harbor devolved on them, then at any distance where an obstruction to entering the harbor existed they would be equally bound to remove it; and that this obstruction was in the open lake, where the defendants had no control, and for which they ought not to be responsible.

The mere fact of distance from the end of the artificial work must always be a question of degree. If there existed such an obstacle to the entrance to the harbor, that without its being removed or opened sufficiently to let vessels in the harbor itself never would be capable of receiving vessels, there would in effect be no harbor, and no tolls could be charged. If the defendants made such a removal or opening,

and began to charge tolls, the duty of keeping the entrance open would in my opinion clearly attach.

But in the present case the defendants have no such objection in fact to urge. It is, as regards this action, merely speculative, for the fact is, (at least I gather so from the evidence,) that the sand-bar formed outside the entrance to the harbor is the result of the piers themselves being placed as they are. It is not a merely natural obstruction, for if the piers were not where they are, and in their present condition, the bar would not be there either.

I look upon the defendants as having contracted, in consideration of their being allowed to charge tolls, to construct a harbor capable of receiving and sheltering vessels, and as long as they continue to charge tolls to maintain the harbor and approaches to it in such a state that vessels of such size as the harbor itself is fitted for may enter for shelter, as well as to secure or deliver cargo, without danger from such obstructions as are reasonably and properly under the defendants' control.

Had the jury taken a different view as to the negligence of the plaintiff and those in charge of his property, I am not prepared to say I should have dissented from them, but I do not think the case strong enough to warrant a new trial on this ground, and the argument has proceeded mainly on the general question of the defendants' liability.

I think the appeal should be dismissed with costs.

HAGARTY, J.—I regret being obliged to concur in dismissing the appeal, as I think the weight of evidence strongly against the plaintiff. But, as I understand the power of this court, we are not at liberty to hold this a ground for appeal.

The Harbor Company may possibly have to thank themselves for the result, as they gave no evidence whatever at the trial to explain their own position, or to give the court any facts explanatory of the nature of their incorporation, or as to the usual state of the harbor before or since the erection of the piers, or as to the nature of the shifting bar, or the course of navigation in the month of November, &c., &c.

As from the scant and meagre statements at the trial some evidence was given that the company seem to have undertaken the task or duty of dredging out an approach to the harbor mouth, I cannot say that the jury were clearly unwarranted in assuming that they had neglected a duty formally and publicly assumed by them, not merely of affording a shelter to vessels, but of maintaining a reasonably accessible entrance within their piers.

Had the evidence been merely that a company had constructed a small harbor by erecting two piers at the mouth of a creek, and that outside the piers, 200 yards or further, there was a known natural bar of sand or rock, giving a depth of water varying from 3 to 8 or 10 feet, and that the company never had interfered with or tried to deepen the channel, or in any way professed to alter its natural state, I cannot at present think the law casts any duty on them to insure to all vessels ordinarily used in lake navigation a safe and commodious access to the shelter of their piers.

But if such company profess so to do, and in fact employ themselves in deepening or widening the natural channel, rendering it passable for vessels of greater burden than before, I think they must be held answerable for any neglect of the duty which they have publicly taken upon themselves, although the law may not have imposed such duty upon them from the mere fact of their erecting piers for shelter of all craft able to pass the channel in its natural state.

Per Cur.—Appeal dismissed. (a)

(a) The Chief Justice of the Common Pleas has kindly referred the reporter to the following note of a case tried in England in December, 1859, which appears in the Annual Register for that year.—Vol. CI., page 187. “£40,000 damages—In the Court of Exchequer the case of *Penhallow v. The Mersey Docks*, was heard. The *Sierra Nevada*, a ship belonging to the plaintiffs, laden with guano, was passing through the gates of the docks of the defendants, when she struck amidships upon a bank of mud, which had been improperly permitted by the defendants to accumulate upon the cill. The ship broke, and the water entering destroyed the cargo. The jury found a verdict for the plaintiff with damages £40,000.”

An application to change the venue in that case is reported in 29 L. J. Ex. 21, from which it appears to have been an action arising from the same accident as that on account of which the suit of *Gibbs v. The Trustees of the Liverpool Docks*, (3 H. & N. 164,) was brought, the owners of the ship being the plaintiffs in one case, and the owners of the cargo in the other.

See *Thompson v. The North Eastern Railway Company*, (3 L. T. Rep. N. S. 618,) reported since the decision of *Webb v. Port Bruce Harbor Co.*

PEEBLES ET AL. V. LOTTRIDGE AND POTTS.

Ejectment — Order to substitute one defendant for another — Record made up against both — Irregularity — Evidence of title.

Ejectment having been brought against A., B. was by judge's order allowed to defend in his place, and the issue book and notice of trial were served as against B. alone, but A's name was inserted in the record as a co-defendant. A verdict having been found for the plaintiff, on motion in term an affidavit was filed that B's attorney was not aware of A's name being on the record until after the trial had commenced, and that B. had been prejudiced in his defence by being deprived of A's evidence.

The court set aside the record and verdict for irregularity.

The plaintiffs claimed under a mortgage from A., whose title B. denied; and, *Semble*, that upon the evidence, set out below, the verdict could not have been supported.

EJECTMENT for the Albion Hotel, situate on part of the beach known as Burlington Beach, in the township of Saltfleet.

The plaintiffs claimed title by virtue of a mortgage executed by the defendant Potts and his wife, dated the 23rd of March, 1858.

The defendant Potts did not appear to the writ or make any defence, but his name was retained upon the record as the person to whom the writ of ejectment was directed.

The defendant Lottridge appeared under leave obtained for that purpose from a judge, and gave notice that besides denying the plaintiffs' title, he claimed the premises in question: 1st. By conveyance from his late father, William Lottridge. 2nd. By grant from the Crown to himself the defendant, or to those through whom he claimed, or some of them. 3rd. By an adverse possession by himself and those through whom he claimed for sixty years and upwards. 4th. By adverse possession by himself and those through whom he claimed for twenty years and upwards.

The trial took place at Hamilton before *Burns, J.*, and the facts appeared as follow:—the defendant Potts occupied an old house upon the beach, which he rented from the defendant Lottridge. That house was situated upon ground belonging to the government, and Lottridge and his father before him had held possession of it, with some land fenced in, and at one time the father was in possession of the land where the Albion house was built. The defendant Potts built the house called the Albion Hotel upon vacant land,

part of Burlington Beach, about a hundred yards from the old house which he had occupied as tenant to Lottridge. The plaintiffs were the contractors and builders of the hotel for the defendant Potts, and furnished all the materials. After the building was finished Potts moved into it and occupied it, and he still continued to live in it. Potts executed the mortgage to the plaintiffs after he was in possession, for the purpose of securing to the plaintiffs the price of constructing the hotel and the materials.

The only evidence given by the defendant of ownership was, that before the war of 1812 the father of Lottridge lived in what was called the government house, and had possession of some of the beach with it. Then a new house was put up after that house was burned during the war, and Lottridge's father was in possession of that and part of the beach. The witness could not say that he had ever fenced in the place where Potts built the Albion Hotel.

The learned judge left it to the jury to say whether defendant Lottridge, or his father before him, ever had possession of the land upon which the Albion Hotel was built, within the period of twenty years before this action was brought. The jury found that defendant Lottridge had not, nor had his father ever been in possession of the land where the hotel was built and fenced for the plaintiffs.

O'Reilly, Q. C., obtained a rule to shew cause why the *nisi prius* record, and the verdict entered thereon, should not be set aside for irregularity, in inserting Potts' name as a co-defendant instead of having Lottridge's name as sole defendant; or why the verdict should not be set aside and a new trial had, on the ground of misdirection of the learned judge in holding that there was evidence for the jury of title in the plaintiffs; and why there should not be a new trial on the ground of surprise on the point of the alleged possession of Potts.

The first part of the application was supported by the affidavit of the attorney of Lottridge, shewing that a judge's order was obtained on the 14th of January last for defendant Lottridge to appear in lieu of the tenant: that the issue book was made up and served, and also notice of trial served in the name of Lottridge alone as a defendant; and the at-

torney swore that he did not know that Potts' name was still retained as a defendant until after the trial had commenced, and that the said Potts was rejected as a witness for defendant at the trial in consequence thereof.

The latter part of the application was supported by the affidavits of the defendant Lottridge and Potts. The defendant Lottridge stated that he claimed by length of possession of the piece of ground where the hotel stood, and also contended that the original patent to his father, from whom he claimed, covered the piece in question. With regard to the possession, they both stated that Potts erected the hotel contrary to the orders and directions of Lottridge, and that while the plaintiffs were doing the work for Potts the defendant Lottridge forbade their proceeding with the work: that in the month of September, 1859, Lottridge brought an action of ejectment against Potts, and obtained judgment by default, after which Lottridge granted Potts a lease of the hotel and grounds, under which he was in possession when the present claim was brought. Potts denied that he was in possession of the premises at the time the mortgage was executed. It was also stated that the defendant Lottridge was going to call one of the plaintiffs as a witness with respect to the possession, and of their being forbidden to proceed in the erection of the hotel, but that the plaintiff quitted the court just as the trial was called on, though he had been in attendance every day before, and was on that day half an hour before the trial.

M. C. Cameron shewed cause. He filed no affidavit explaining why the record was made up as it was.

ROBINSON, C. J., delivered the judgment of the court.

On reading the affidavits filed on the part of the defendant Lottridge, we are of opinion that the rule should be made absolute for setting aside the *nisi prius* record and the verdict for the plaintiffs, for irregularity, in making up the record with the name of Kennedy Sinclair Potts as a co-defendant, —Lottridge having been by order of a judge admitted to defend *in lieu of* Potts, and not jointly with him, and the issue book having been made up accordingly, and the plaintiffs' notice of trial being in a cause in which Lottridge was named the sole defendant.

It is sworn that Lottridge suffered a disadvantage in consequence, not being able to avail himself of the evidence of Potts because he was a defendant on the record, though until the trial the defendant Lottridge had no knowledge that such was the case, but had every reason to think otherwise, from the terms of the judge's order, from the issue book delivered, and from the notice of trial served upon him.

As we think the defendant Lottridge is entitled as of strict right to have the proceedings set aside, which are inconsistent with the judge's order made in the cause, it is not necessary for us to go into the other question of the sufficiency of the plaintiffs' evidence of title; and I will only say that at present it does not appear to me that the plaintiffs did give such evidence of title as entitled them, or any of them, to a verdict, for the fact of Potts having mortgaged the premises to the plaintiffs could estop no one but himself and those claiming under him from denying the mortgagee's title, and Lottridge it appears did not claim under him, but his possession was rather under Lottridge.

We make the rule absolute to set aside the *nisi prius* record, and verdict for the plaintiffs, for irregularity.

Rule absolute.

MARTIN V. WELD ET AL.

Boundaries—Possession—Mutual error—Statute of Limitations.

The fact that both plaintiff and defendant were under a common error as to the true boundary of their lands will not prevent the Statute of Limitations from running against the true line, though it would be otherwise if it had been agreed upon between them that a certain line should govern whether correct or not.

TRESPASS to parts of lots 11 and 12, in concession D., in the Township of Delaware, described by metes and bounds, for destroying the plaintiff's rails and for assaulting the plaintiff.

At the trial, at London, before *Richards, J.*, it appeared that the plaintiff and the defendant Stephen Weld had got into a dispute about boundaries, Weld owning lot No. 11, and the plaintiff lot No. 12, and while the plaintiff was putting up a fence on what he claimed to be the proper line these defendants came up to him, and cut up some of the rails,

and defendant Stephen Weld struck him, but not before the plaintiff had assaulted and struck Weld.

The learned judge told the jury that he thought the survey on which the defendant Stephen Weld relied appeared to be correct, and if it were, then, so far as he was concerned, he was justified in entering upon his own land, and cutting up his own rails, for they had been just before made from a tree cut, as it seemed, on the defendant's side of the division line; unless, indeed, the jury should be satisfied from the evidence that the plaintiff had been twenty years in actual possession of the *locus in quo* by inclosing and using it, as to which the evidence was contradictory, and perhaps left the point uncertain.

The plaintiff had settled upon his lot (No. 12) in 1829, and continued ever since to reside upon it, and according to some evidence given on his part he had for more than twenty years been in actual exclusive possession of the piece of land in dispute, at least of that part of it where the alleged trespass was committed by the defendants. The evidence on the part of the defence, however, tended to prove the contrary.

The jury found for the plaintiff, and £2 damages.

Becher, Q. C., obtained a rule *nisi* for a new trial on the law and evidence, for misdirection, and on affidavits, to which *J. Wilson*, Q. C., shewed cause.

The misdirection complained of was in regard to the evidence upon the point of twenty years' possession by the plaintiff of the *locus in quo* and the effect of such possession under the circumstance of an alleged common error as repeated the true boundary.

ROBINSON, C. J.—We do not consider that the fact (if the truth was so) that the plaintiff and defendant were under a common error in regard to the true line of division between them, would prevent the new Statute of Limitations running, though it might and has been allowed to do so under the former law, when it was necessary to make it appear that the possession for twenty years was adverse, and not with acquiescence or permission.

If it were shewn that a line had been agreed to between the respective proprietors, and that it was understood it should govern, whether perfectly correct or not, the case would be different. That would be a coventional line binding upon both parties, on the principle of an estoppel in *pais*. Here, according to the true line of division, if that alone should govern under the circumstances, the defendants would seem entitled to a verdict, but the evidence of possession being held by the plaintiff for more than twenty years of the *locus in quo*, does seem to be sufficient to warrant the verdict, and we have determined that upon the evidence given at the trial it ought not to be disturbed.

Rule discharged.

VANBUREN V. GEORGE E. BULL, WILLIAM DOWNING, WILLARD CONKEY, JAMES O'HARA, RICHARD CORRIGAN, SMITH FOOTE, AND MARY FOOTE, HIS WIFE.

School trustees and teacher—Arbitration between—Power of arbitrators—Personal liability of trustees.

Declaration, for converting the plaintiff's goods. *Plea*, that during 1859, the plaintiff was one of the trustees for a certain school section, the trustees of which for 1857 had employed one F. as a teacher by agreement under their corporate seal: that differences having arisen between the trustees and F., they were, in 1859, referred to arbitration under the provisions of the statute, and the arbitrators awarded that there was due to F. £25 4s. 9d.: that the trustees should pay F. that sum, with £14 for costs of the arbitration, out of the funds of the school sections within thirty days; and that if they should refuse or neglect to do so, they should be personally liable for the same: that they did neglect and refuse to pay, and to exercise their corporate powers to collect the sum required, and therefore the arbitrators issued their warrant to levy the same out of the funds of the section, which was returned *nulla bona*: that the arbitrators then summoned the plaintiff and the other trustees to shew cause why a warrant should not issue against their property for the amount; that the plaintiff having appeared and shewn no sufficient cause, they adjudged that the plaintiff and the other trustees were personally liable, and should pay the sum awarded, together with £5 6s. for subsequent costs; and that afterwards they issued a warrant to levy this amount from their goods, under which the plaintiff's goods were seized and sold, which is the grievance complained of.

Held on demurrer, plea bad for 1. The arbitrators had no power to award costs. 2. Nor that the sum should be paid within thirty days. 3. Nor to resume consideration of the matter, after having once made their award. 4. Nor to decide that the trustees were personally liable.

Trustees cannot be held liable unless they wilfully neglect to do their duty, not where they decline in good faith to exercise their corporate powers, on account of any doubt or legal difficulty which they suppose to exist.

DECLARATION, for converting to defendants' use and depriving the plaintiff of the use and possession of his goods.

Plea, by defendants George E. Bull, William Downing, and Willard Conkey, that during and for the year 1859, and from, up to, and until and after the committing of the alleged grievances in the declaration mentioned, the plaintiff was one of the school trustees for Union school section number two of the township of Rawdon, in the county of Hastings; and that the trustees of the said school section for the year 1859, by a certain agreement in writing, under the corporate seal of the said section, hired and employed the defendant Mary Foote, then Mary Stevens, as a teacher, to teach in the said school section for a certain period, and at a certain salary in the said agreement mentioned: that the said Mary Foote did, in accordance with the said agreement, duly perform the duties of such teacher, and carry out and fulfil the said agreement so entered into with the trustees on her part: that some disputes and differences having arisen between the trustees of the said school section and the said defendant Mary Foote, then Mary Stevens, with respect to the payment of her salary under the said agreement, and the said payment having been delayed for a long time, although repeated applications for payment had been made by the said Mary Foote, then Mary Stevens, to the trustees of the said section, the said defendant Mary Foote, then Mary Stevens, for the purpose of arranging and settling the said difference, and to obtain payment of the said claim, and in accordance with the statute in that behalf, determined to have the matter referred to arbitration; and thereupon, about the 7th day of May, 1859, called upon and required the trustees of the said section, of whom the said plaintiff was then one, to nominate and appoint an arbitrator to act in their behalf and that of the said section in the said matter: that the said defendant Mary Foote, then Mary Stevens, immediately thereupon nominated and appointed the defendant George E. Bull as her arbitrator, and the said then trustees of the school section, of whom the plaintiff was one, thereupon nominated and appointed the defendant Willard Conkey as their arbitrator, and that of the said section, and the local superintendent for the said section nominated and appointed one Henry Brown as third arbitrator, in the place of him, the said superinten-

dent, to arbitrate upon the said matter in dispute and differences between the said Mary Foote, then Mary Stevens, and the trustees of the said section, in accordance with the statute in that behalf.

That the said arbitrators having taken on themselves the burthen of the said reference, and having duly considered and weighed the matters to them referred, and having heard the plaintiff in the said matter, the said plaintiff having appeared before them as such arbitrators as aforesaid in the said matter; they, the said arbitrators, did, in accordance with the said statute, on the 5th of July, 1859, duly make and publish their award in writing, under their respective hands and seals, of and concerning the matters to them referred, and thereby awarded that there was due and owing at the time of the making of the same to the said Mary Foote, then Mary Stevens, and described in the said award as Mary Evangeline Stevens, the sum of £25 4s. 9d., by and from the trustees of the said school section; and by which said award it was further ordered that the said trustees should pay or cause to be paid to the said Mary Foote, then Mary Stevens, the said sum of £25 4s. 9d., and also the further sum of £14 for costs, charges and expenses attending the said reference, arbitration and award; and the said arbitrators did further order and adjudge, in and by the said award, that the said trustees should pay or cause to be paid the said several sums of money, amounting in all to the sum of £39 4s. 9d., out of the funds of the said union school section thirty days from the date of the said award; and in case the said trustees should refuse or neglect to pay the said sum by the said time, then that the said trustees should be personally liable for the same, and that then the said plaintiff, and one Peter J. Weaver and Thomas M. Bell, being such trustees as aforesaid, should pay or cause to be paid the said sum—all of which will more fully and at large appear from the said award, when produced, and of all which the plaintiff had notice.

And the defendants say that the said trustees of the said section did neglect and refuse to pay the said sum of £39 4s. 9d. at the time aforesaid, and did neglect and refuse

to exercise their corporate powers as such trustees as aforesaid to collect the sum or sums necessary to fulfil their corporate obligations in the said matter ; and thereupon the said arbitrators, for the purpose of enforcing the said award, and obtaining payment for the said Mary Foote, then Mary Stevens, of the moneys thereby awarded to her, did at her request, and in accordance with the statute in that behalf made and provided, and after the expiration of the said period of thirty days, duly issue their warrant under their hands and seals, and directed the same to the defendant William Downing, as their bailiff, and thereby and therein, after reciting the said award, commanded the said defendant William Downing to make and levy, by distress and sale of the goods and chattels of the said union school section number two, in the township of Rawdon, the said sum of £39 4s. 9d., and costs of execution, and to pay the same over to them, the said arbitrators, for the said Mary Foote, then Mary Stevens, of all which the plaintiff had notice.

And the defendants further say, that the said warrant was thereupon, and after the issuing of the same, duly placed in the hands of the said defendant William Downing for execution, and that the said defendant William Downing duly returned the same on the 8th of August, 1859, to the said arbitrators *nulla bona*, of all which the plaintiff had notice.

And the defendants say, that thereupon, and after the return of the said warrant, the said arbitrators, in pursuance of the powers in them vested, and of the statute in that behalf, on the 29th of September, 1859, by a summons under their hands and seals, and served on the said plaintiff, summoned the said plaintiff and the said Peter J. Weaver, and the said Bell, to appear before them at a time and place therein mentioned, and shew cause, if any they had, why a warrant should not be issued against their personal property for the amount of the said award and costs, in consequence of their having refused to exercise their corporate powers as such trustees as aforesaid to collect the sum or sums necessary to fulfil their corporate obligations in the said matter ; and the said defendants say that the said plaintiff and the said Weaver, and the said Bell, did neglect and refuse to

exercise their corporate powers to collect the sum necessary to fulfil their corporate obligation in the matter, and the amount of the said award and costs.

And the defendants say, that the plaintiff appeared under the said summons, and the said plaintiff having so appeared under the said summons, and having shewn no good and sufficient cause or reason, in answer to the said summons, they, the said arbitrators, in pursuance of their said office as such arbitrators as aforesaid, and of the statute, did, on the 3rd of October, 1859, order and award, in the matter of the said reference, that the said plaintiff had no good and sufficient reason or cause to shew why such warrant should not be issued; and did order, award, and adjudge that the said plaintiff and the said Weaver, and the said Bell, were personally liable and responsible for the amount of the said award and costs, and all subsequent costs, charges and expenses incurred in the said matter; and they, the said arbitrators, did further order, award, and adjudge, that the said plaintiff, and the said Weaver and Bell, did neglect and refuse to exercise their corporate powers as such trustees as aforesaid, to collect the sum and sums necessary to discharge the corporate obligations in the said matter, and that the said plaintiff, and the said Weaver and Bell, should forthwith pay or cause to be paid unto the said Mary Foote, then Mary Stevens, the said sum of £39 4s. 9d., together with a further sum of £5 6s., being a balance due on subsequent costs, charges and expenses in the matter of the said arbitration, of all which the plaintiff had notice.

And the defendants say that thereupon, and after the making of the said last mentioned award, on the 3rd of Oct., 1859, the said arbitrators, in pursuance of their said power as arbitrators as aforesaid, and in accordance with the statute, duly issued a certain other warrant under their hands and seals, and directed the same to the defendant William Downing, thereby commanding him to levy of the goods and chattels of the said plaintiff, and the said Weaver and Bell, the moneys in the said warrant mentioned, and which warrant states on the face of it the proceedings against the said the trustees of union school section number two, in the township of

Rawdon, in the county of Hastings, the making of the award, the amount awarded, and the issue and return of the warrant above mentioned against the goods and chattels of the said school section, and the said summons to the said trustees to appear before them, the said arbitrators, to shew cause why the said warrant should not issue against their own proper goods and chattels, and also therein all the proceedings had thereon, and also on the face of it shews and alleges that the said trustees of said school section did and had neglected and refused to exercise their corporate powers as required by law, as such trustees as aforesaid, for the purpose of liquidating and paying off such award first above mentioned, and of discharging their corporate obligations in the said matter, and which warrant was directed by said arbitrators to said William Downing, describing him in due form of law, requiring and commanding him to make and levy by distress and sale of the goods and chattels of the plaintiff, and the said Weaver and the said Bell, the amounts mentioned in the said warrant, in all being the sum of £43 10s. 9d., and his costs of doing so: all of which on reference to said warrant will more particularly appear, and of all which the plaintiff had notice.

And the defendants further say, that the said defendant William Downing, as such bailiff as aforesaid, and under and by virtue of the said last mentioned warrant delivered to him by the defendant, and pursuant to the statute, seized and took in execution the goods and chattels of the plaintiff in the declaration mentioned, and sold the same, and levied thereout the moneys directed to be levied in and by said warrant, which is the conversion and wrongful deprivation and grievance in the said declaration mentioned, of all which the plaintiff had before the commencement of this suit full notice. The words defendants, in this plea, refer solely to those mentioned in the introductory part thereof.

Demurrer, on the grounds that if every thing stated in the plea were true, it would afford no defence, because by the school act it could never have been contemplated that the private property of school trustees should be held liable owing to the awards of arbitrators; and even if they did neglect or refuse to

exercise their corporate powers it must be a wilful neglect on the part of the trustees, and one calculated to defeat the operations of the school law : that the plea does not shew this, nor that the plaintiff could recover any moneys, if he paid them under the awards, from the inhabitants of the school section.

The case was argued last term, by *O'Hare*, for the plaintiff, who cited *Kennedy v. Burness*, 15 U. C. R. 473; *Kennedy v. Hall*, 7 C. P. 218, 224.

Bell (of Belleville) contra, cited *Tiernan v. School Trustees of Nepean*, 14 U. C. R. 15; *Consol. Stats. U. C. ch. 64*, secs. 26, 27, sub-secs. 8, 10, 11, 20, secs. 83, 84, 87.

ROBINSON, C. J., delivered the judgment of the court.

We have now seen that this case is not affected by any thing contained in the School Act passed in the last session, (23 Vic., ch. 49,) which we had not had an opportunity of seeing last term, as it had not then been published.

The plaintiff is in our opinion entitled to judgment on the demurrer, for we think the special plea of justification fails on several grounds.

First, we do not find that the School Acts give any authority to the arbitrators to award costs in such cases, and if the award was bad in that respect, then the warrant against the goods of the plaintiff was illegal, and does not support the seizure.

Then, secondly, the arbitrators, in our opinion, had no authority to award that the sum which they found due to the teacher, and the costs of the award, should be paid in *thirty days*, or that the trustees should be personally responsible. That is in effect taking upon themselves to determine that by the due exercise of their corporate powers the trustees could certainly have imposed a rate and caused it to be collected within thirty days; or that the trustees had within their control as trustees the means of otherwise paying the award, neither of which questions is by any law that we can find submitted to their decision.

Thirdly.—After having made an award the arbitrators'

authority was, we think, at an end, and they had no power to resume consideration of any matter in difference between the teacher and trustees, and to make a second award, and make also a second allowance of costs.

Fourthly, which is the main point in the case, we do not think that it is made any part of the duty of the arbitrators by the law to decide whether the school trustees had or had not wilfully neglected or refused to exercise their corporate powers for raising and paying the money which they awarded. It appears to us that that is a question for courts of justice to determine in any action that may be brought against the trustees, charging them as being individually responsible by reason of such alleged refusal or neglect, for we do not take it that that can be called a matter in dispute between the teacher and the trustees. It is rather a point on which the statute itself has made provision, upon certain facts being ascertained. Jurisdiction is not given in express terms to arbitrators over that question, but rather as to the existence of any claim on the part of the teacher, and the amount of such claim.

And in addition to all this, it is material that the plea nowhere asserts that the trustees, or the plaintiff as teacher, had *wilfully* neglected or refused to use their corporate powers. The word *wilfully* extends, we think, to both the verbs which follow it, for though it is true that to refuse implies an exercise of the will, yet we conceive the legislature to have used the word *wilfully* in this sense, that the trustees are to be individually liable when they either neglect wilfully, or refuse willfully, *to do their duty* in this respect. There may be cases in which the trustee may from a conscientious sense of duty have refused on account of a legal difficulty, which he may think disables him from doing what is required of him.

Judgment for plaintiff on demurrer.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF QUEEN'S BENCH,

FROM MICHAELMAS TERM, 23 VICTORIA, TO

TRINITY TERM, 24 VICTORIA.

ABATEMENT.

Plea in.—See MORTGAGE.

ABANDONMENT.

See INSURANCE, 5.

ABSCONDING DEBTOR.

Priority as between executions and attachments.—See GUARANTEE.

ABSTRACT OF TITLE.

Covenant to furnish—Action thereon.—See SALE OF LAND, 2.

ACCOMPLICE.

Semble, that a conviction upon the evidence of an accomplice not corroborated by other testimony is not illegal.—See CONSPIRACY.

ACTION.

1. *Crown Lands agent—False representation and collusion in order to obtain increased price on public land—Right of action.*—A., a Crown lands agent, being asked by the plaintiff whether there were any lands for sale by government

in the township of M., told him that there were not, but that B. had certain lots there to which he would sell his right, and the plaintiff being introduced by A. to B. paid the latter £50 for his good will, together with the first instalment required by government, and received from him a receipt for the latter signed by A. as Crown lands agent. The jury found that the representation that there were no lands for sale was false, and made by A. in concert with B. to enable the latter to obtain an advance upon the government price. *Held*, that the £50 and interest might be recovered in an action against A. and B., either upon a special count charging the false representation, and the damage suffered in consequence by the plaintiff; or as money had and received. *McMaster v. Andrew Geddes and James Geddes*, 216.

2. *Insufficient construction of drain by lessee—Injury to adjoining premises—Liability of assignees of lessee—Evidence.*—One H. held a lease of certain premises, with a right of purchase, and assigned his interest

to defendants in trust for creditors. The plaintiff in his declaration alleged that owing to the insufficient construction of a drain built by H., and continued by defendants and their tenants, the water and drainage escaped into the plaintiff's house adjoining, thus making it unhealthy, so that he could not lease it as he otherwise might have done. The plaintiff's evidence shewed that the drain from the defendant's house adjoined his cellar wall, and that, especially during rains, the water came into the cellar, so that he was obliged to abate the rent and build a new drain in consequence; but it was not clearly shewn that the injury was caused by the insufficiency of defendants' drains, *Held*, that it was properly left to the jury to say whether this did in fact occasion the injury, and that if so the defendants were liable. *Foster v. Cameron and Foster*, 224.

Against municipal corporation by school teacher on treasurer's acceptance, and for refusal to levy rate—See COMMON SCHOOLS, 2.

By commissioner for taking evidence in contested election for Legislative Council, to which the statute giving him fees was held not to extend.—See ELECTIONS.

For accidental fire.—See FIRE.

Against Harbor Company, for obstructions to entrance of Harbor.—See HARBOR COMPANY.

Verdict for claimant in Interpleader—Subsequent action by him against execution plaintiffs.—See INTERPLEADER, 1.

Against sheriff for giving up goods after interpleader order made.—See INTERPLEADER, 3.

Against municipal corporation for not maintaining crossings.—See MUNICIPAL CORPORATIONS, 1.

Against owners of house, for injury by snow falling from the roof.—See SNOW.

Of trespass, against person indemnifying sheriff for seizing goods.—See TRESPASS.

See GUARANTEE. — RAILWAY. — SHERIFF.

ADMISSION.

Of title, by notice in ejectment.—See EJECTMENT, 2.

AFFIDAVIT.

Of bona fides and of execution of bill of sale.—See BILL OF SALE.

For re-filing chattel mortgage—Statement of interest due.—See CHATTEL MORTGAGE, 2.

Of Jurors, not received as ground for new trial.—See CONSPIRACY.

Required with plea bringing title in question in County Court—Effect of not furnishing such affidavit with plea.—See COUNTY COURT.

Of loss, &c., by fire.—See INSURANCE, 4.

Put in after argument of appeal from County Court, not received.—See LANDLORD AND TENANT, 2.

AGENT.

Transfer of stock by Agent—Proof of authority.—See STOCK.

See CROWN LAND AGENT. — PRINCIPAL AND AGENT.

AGREEMENT.

Construction.—*Held*, that under the agreement between the city of Kingston Water Works Company, and the Corporation of the City of Kingston, set out in this case, the company were not bound to supply water gratuitously to the city for any purpose at more than

twenty hydrants. *The Corporation of the City of Kingston v. The City of Kingston Waterworks Co.*, 490.

See GUARANTEE—SALE OF LAND.

AMENDMENT.

Misjoinder of defendants—Amendment at trial.]—In an action on a bill of exchange accepted by a firm, the name of one defendant, who it appeared was not a partner, was struck out at the trial, and the amendment was afterwards held by the court to have been proper. *Cowan et al. v. McIntyre et al.*, 607.

APPEAL.

From County Court—Three perverse verdicts—New trial ordered.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

See ASSESSMENT—COUNTY COURT—LANDLORD AND TENANT, 2.

ARBITRATION AND AWARD.

1. *Costs of actions decided before reference—Evidence of arbitrators as to matters in difference.*]—To an action on an award defendant pleaded a set-off for costs of defence in certain suits due to him by the same award. The award when produced recited a submission of a certain action commenced in the Common Pleas by the plaintiff against defendant, and also of "all other matters of difference, action and actions, suits, and controversies whatsoever," and awarded that defendant should pay all costs of said suit in the Common Pleas, "and all other law costs occasioned by any suit or suits, action or actions, either at law or equity, had about and regarding the premises, and brought before the execution of said bonds of submission to arbitration; and we also order and direct that

no further proceedings shall be had in any or either of said actions." *Held*, affirming the judgment of the county court, that the defendant could not under his plea recover for costs of suits in which judgment had been given before the reference, for they were not included by the terms either of the submission or award. *Held*, also, that the evidence of the arbitrators was rightly received, to shew that such costs were not intended to be allowed. *Campbell v. Howland*, 18.

2. *Award—"Submission," and "reference,"—Meaning of—Want of Finality—Pleading.*]—By a submission the costs of the "reference and award" were to be in the discretion of the arbitrators, and they directed that the defendants should pay the costs of the "submission and award." *Held*, that the award was final, for that the costs of the submission included the costs of reference. The submission and award being set out in full in the declaration, *quære*, whether this objection could be raised by plea, or whether defendant should not have demurred. *Ellwood v. The Corporation of the County of Middlesex*, 25.

3. *Bond—Condition in restraint of trade—Verdict subject to award—Motion to arrest judgment.*]—The plaintiff sued defendant on a bond conditioned not to commence business as an hotel-keeper within three years in a certain township. At the assizes the case and all matters in difference between the parties in connexion with it were referred. A verdict was taken for the penalty subject to the award, and a memorandum of reference endorsed on the record, signed by the attorneys. By this minute power was given to the arbitrator to examine the parties and their witnesses, certify for costs, and amend the pleadings;

but it contained no agreement not to bring error, and no rule of reference had been drawn up. An award having been made in favour of the plaintiff, defendant moved to arrest judgment, on the ground that the condition was void, being in restraint of trade. The application was refused, on the grounds that the arbitrator might for all that appeared have decided the point now raised, as he had power to do, or the award might have been upon some other matter connected with the contract. *Held*, no rule of reference having been drawn up, that it could not be assumed that defendant had referred on the ordinary condition not to bring error. *Held*, also, that if the motion had been after verdict, without a reference, defendant must have succeeded, for the contract being in restraint of trade it was necessary to shew a consideration, and none appeared in the declaration. *Daves v. Wilkinson*, 604.

See COMMON SCHOOLS, 5, 6.—
MISTAKE. — MUNICIPAL CORPORATIONS, 4.—RAILWAYS.—SHERIFF.

ARREST.

Privilege of Members of Parliament from arrest under order to commit for not appearing to be examined pursuant to judge's order.—*See* PRIVILEGE.

ARTICLED CLERK.

Articled Clerk—Service.—*H.* having been articled on the 21st of November, 1854, for five years, was permitted by his master to be absent during 1855, for six months, under the belief that that period would be allowed. This he spent at a grammar school preparing for the University. He was afterwards absent from the office for eight and five weeks respectively,

in 1856, to prepare for his examination at the University. *Held*, that the six months so spent could not be allowed, but that the other periods might be. *In the matter of Henry H. Hume, applying to be admitted as an attorney and solicitor*, 373.

ASSESSMENT.

Occupier—Omission to appeal—Replevin.—*Seemle*, that a lessee of a house in a city cannot be assessed as occupier, when he no longer occupies it, although his term still continues: but, *held*, that the plaintiff in this case having omitted to appeal was liable to pay the sum assessed against him, and therefore could not replevy his goods which had been seized. *McCarrall v. Watkins et al.*, 248.

Sale of land for taxes.—*See* TAXES.

ASSIGNMENT.

1. 22 Vic., ch. 96, sec. 19.]—An assignment for the benefit of such creditors as should execute it within thirty days, and agree to release the assignor, *Held*, void under the 22 Vic., ch. 96, sec. 19. *Darling and Daniels v. McIntyre, Sheriff*, 154.

2. An assignment made before the 22 Vic., ch. 96, in favour of those creditors only who should execute within a certain time and release the debtor, *Held*, void.

It contained also a provision that the assignee might carry on the business for the benefit of the creditors executing, and employ the debtor to manage it, at such salary as might be agreed on, and might supply goods to keep up the stock, and for the more beneficial management of the business for the interests of the creditors, and pay for

the goods as supplied out of the trust estate. *Quære*, whether this would make the executing creditors partners in the business. *Crapper v. Paterson et al.*, 160.

3. *Mortgage*—22 Vic., ch. 96—*Interpleader*.]—M. sold goods to P., and took back a mortgage on them for the price, together with P.'s note. Afterwards, and after the 22 Vic., ch. 96, M., who was then insolvent, assigned the mortgage to F., and F.'s agent received possession of the goods, most of which, if not all, had been originally purchased by M. from F., and were still unpaid for. The goods having been seized under an execution against M., an interpleader issue was directed between F. and the judgment creditor. *Held*, that the assignment of the mortgage to F. was void under the statute 22 Vic., ch. 96; but that, putting it aside, M., as mortgagee, had no interest which could be sold under execution, and that F., therefore, having possession, was entitled to hold the goods as against the execution creditor. *Ferrie v. Cleghorn*, 241.

4. *Filing—Execution*—20 Vic., ch. 3, sec. 2.]—Where an assignment is filed within the five days allowed by the 20 Vic., ch. 3, sec. 2, the filing relates back to the execution, and the assignee is entitled as against a *fi. fa.* placed in the sheriff's hands after the assignment has been executed, but before the registration. *Feehan v. The Bank of Toronto*, 474.

Of policy of insurance.]—See INSURANCE, 1.

Of bond to the limits.]—See LIMITS, 2, 4, 5.

See BILL OF SALE. — CHATTEL MORTGAGE.—COVENANTS FOR TITLE.—EVIDENCE, 2. — INTERPLEADER, 2.—LIEN,—SALE OF GOODS, 2.—SATISFACTION.—SET-OFF.—STOCK.

ASSURANCE.

See INSURANCE.

ATTACHMENT.

Against absconding debtor—Priority as against executions.]—See GUARANTEE.

ATTORNEY.

Cannot authorise departure of defendant from the limits under Ca. Sa.]—See LIMITS, 1, 2.

See ARTICLED CLERK.—BUILDING SOCIETY, 2.

BAILIFF.

Of Division Court.]—See DIVISION COURT.

BILL OF SALE.

Affidavit of bona fides and of execution.]—Where a bill of sale was made to two jointly, and filed on an affidavit of *bona fides* made by one, but the evidence shewed that the consideration was made up of two debts, due to the vendees separately. *Held*, sufficient. *Held*, also, no objection that the affidavit of execution did not state the date of the bill of sale or on what day it was executed. *McLeod et al. v. Fortune et al.*, 100.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Promissory note—Set-off.*]—Action against executors on a note made by testator payable to S. or bearer, and by him transferred to plaintiff. *Plea*, that the note was transferred to the plaintiff after the death of testator, and that S., at the commencement of the suit was and still is indebted to defendants as executors in an amount equal to the note, for, &c. *Held*, on demurrer, plea bad. *Smith v. R. and G. Nicholson, Executors, and Annie*

Nicholson, Executrix of William Nicholson, 27.

2. *Appeal from C. C.—Equitable defence—Perverse verdicts.*—Action by payee against the maker of a note. *Plea*, on equitable grounds, that the plaintiff was the captain of a rifle company, organised according to law: that defendant, being a member of it and a tailor, was employed to make the uniforms, which it was agreed between the plaintiff and defendant should be paid for out of the moneys coming to the said company for their drills according to the statute: that in order to raise the necessary sum at once it was also agreed that a note should be discounted, to be reduced from time to time by the moneys so received, and renewed, until paid off: that in pursuance of such agreement a note was made by defendant payable to plaintiff, which was discounted, and reduced by payment of the money derived from the first ten days' drill, and renewed by the note declared upon, which it was understood should be in the same way reduced, and renewed or paid off, by the proceeds of the second drill: that before said drill the plaintiff wrongfully disbanded the company, so that they were unable to draw any more pay, whereby, owing to the plaintiff's wrongful act, it became impossible to perform said agreement and retire said note. *Held, per Burns, J.*, that the plea afforded no defence.

The plaintiff, instead of demurring, took issue upon this and other pleas, and three perverse verdicts had been rendered for defendant in the court below, the last verdict being general, though upon the other issues the plaintiff was clearly entitled to succeed under the evidence. On appeal this court

ordered a new trial, *Burns, J.*, remarking that, to avoid expense, the defendant might, if he desired it, consent to a verdict for the plaintiff on the other issues, and allow him to move for judgment *non obstante* on this, *Vidal v. Ford, 88.*

3. *Notice of non-payment—Verdict on insufficient evidence—New trial refused.*—Upon a plea denying notice of non-payment of a note, it appeared that the notice, though carelessly mailed by the notary on the day of protest to a wrong address, had been received by the defendant about a week after, and there was some slight proof of his having applied to the plaintiff for further time for payment. The jury were directed that the evidence was insufficient, but they nevertheless found for the plaintiff; and the court, though agreeing with the direction, refused to interfere. *Leith v. O'Neill and Carroll, 233.*

4. *Notice of non-payment—Promise to pay—Pleading.*—Where it was shewn that defendant, an endorser, knowing that notice of dishonour had not been given, promised to pay, *Held*, that the plaintiff was entitled to a verdict on a plea denying notice.

Semble, that it is only necessary to plead that notice was dispensed with, when an agreement to that effect had been made before the time for giving it. *Shaw v. Salmon, 512.*

5. *Promissory note—Condition—Estoppel by pleading.*—“Toronto, 12th May, 1858. Six months after date we promise to pay to J. B., or order, \$400. (Signed,) N. J., W. W. B., E. W. D. The above note is to be paid in merchantable lumber to be delivered in Toronto at cash price, and an additional quantity of lumber sufficient to pay the

freight is to be sent in. If not so paid within the time, then the same is to be paid in cash." This memorandum was written on the face of the note when it was signed. *Held*, not a promissory note.

Held, also, that defendants were clearly not estopped from denying that was a note by having, in addition to the plea of *non fecerunt*, pleaded other pleas in which they denied their liability to pay "the said promissory note." *Boulton v. Jones et al.*, 517.

Action against maker and endorser—Evidence—5 W. IV., ch. 1, sec. 9—16 Vic., ch. 19.]—See EVIDENCE, 1.

See CHATTEL MORTGAGE, 2.—PLEADING.—PRINCIPAL AND SURETY, 2.

BOND TO CONVEY LAND.

See SALE OF LAND, 4.

BOND TO THE LIMITS.

See LIMITS.

BOUNDARIES.

See DESCRIPTION OF LAND.—LIMITATIONS (Statute of) 2.

BRIDGE.

Between counties—Liability to rebuild.]—See MUNICIPAL CORPORATIONS, 4.

See MUNICIPAL CORPORATIONS, 5.

BUILDING SOCIETY.

1. *Usury — Colourable membership.]—The plaintiffs, a building society, sued defendant on a mortgage, by which he covenanted to pay them £200 and interest, by monthly instalments of £4 10s., with all fines and forfeitures imposed upon defendant as a member*

of the society, with a condition that if he should make default for six months successively the whole should become due. Defendant set up as a defence, in various pleas, that the transaction was usurious; that defendant became a member of the society merely to evade the statute, and to enable him to borrow from them at an illegal rate of interest, and after executing the mortgage immediately disclaimed all share in the profits of the society. It was proved that in order to borrow money a person must become a member and subscribe to the rules, but that the disclaimer was required only from those who borrowed, and their property was not then liable for losses of the company as in the case of other members. Held, that the defence was not sustained, and that the plaintiffs were entitled to recover, for what the defendant did was authorised by the statute incorporating these societies. The Canada Permanent Building and Savings Society v. Rowell, 124.

2. *Sale under power in mortgage—Ejectment by mortgagee—Building Societies—Application to set aside proceedings as instituted without plaintiffs' authority.]—The plaintiffs, as mortgagees, having advertised the land for sale under a power contained in a mortgage to them by one B., it was purchased by L., who paid the money to the president, but had received no conveyance; and the president, with his concurrence, then brought an action of ejectment in the name of the society against the mortgagor, to enable them to give the purchaser possession. The defendant, after verdict for the plaintiffs, having applied to set aside the proceedings as brought without their authority, Held, that there was*

clearly no preteuce for such an application.

Remarks as to the right of a building society to bring ejectment in their corporate name, on a mortgage made to the president and secretary. *The Essex Building Society v. Maria Beeman, Executrix of Elam Beeman*, 509.

BY-LAW.

See COMMON SCHOOLS, 3.—MUNICIPAL CORPORATIONS, 5, 6.—PEEL (County of.)—SNOW.

CALLS.

Action for calls on stock—Proof of transfer.]—See STOCK.

CERTIORARI.

See CONVICTION.

CHALLENGE.

Right of by the Crown.]—See CONSPIRACY.

CHATTEL MORTGAGE.

1. *Insufficient description—Purchaser with notice.*]—A chattel mortgage not containing a sufficient description of the goods is void as against subsequent purchasers in good faith, and notice of such a mortgage to the purchaser will not affect his right. *Moffatt et al v. Coulson*, 341.

2. *Affidavit—Description of goods—Mortgage given to secure endorser—Effect of renewing the notes—Interest.*]—An affidavit that a chattel mortgage by two mortgagors was executed in good faith, and not for the purpose of securing the goods and chattels against the creditors of the mortgagors, is sufficient, without adding the words, “or either of them,” as regards the mortgagors, or “any or either of them,” as regards the creditors.

The goods were described in the mortgage as set forth in schedules

annexed. Schedule C. was headed “Household furniture in J. E. W.’s residence,” and specified the several articles in detail, giving a list of those contained in each room, from which the sheriff said he had no difficulty in identifying them. *Held*, sufficient. Schedule D. was headed “Household furniture and property of J. R. McDermott,” and the several apartments containing the furniture were specified. *Held*, also sufficient, as it might be assumed to refer to the party’s residence.

The mortgage was given, as appeared by the recitals in it, to secure the plaintiff against certain notes which he had endorsed for the mortgagors, and before the re-filing he had taken up most of them and renewed them by his own notes, to which the mortgagors were not parties. *Held*, that the mortgage was not thereby invalidated.

The affidavit for re-filing, made on the 28th of January, stated the amount due for interest at what it would be on the 31st, the day of re-filing. *Held*, no objection. *Fraser v. The Bank of Toronto*, 381. See ASSIGNMENT, 3.—BILL OF SALE.

—LIEN—SALE OF GOODS, 2.

CLERK OF DIVISION COURT.

See DIVISION COURT, 2.

COMMISSIONERS.

For taking evidence in contested elections—Right of action for his fees.]—See ELECTIONS.

For Indian Lands.]—See INDIAN LANDS.

Under the overholding tenants’ act, may summon second jury where first cannot agree.]—See OVERHOLDING TENANT.

COMMITMENT.

See PRIVILEGE.

COMMON COUNT.

For land sold.]—See SALE OF LAND, 1.

COMMON SCHOOLS.

1. *School trustees — Execution against — Sale of school house.*]—*Held*, that land conveyed to school trustees for the purposes of a school could not be sold under execution against them on a judgment obtained for the money due for building the school house. *Scott v. The Trustees of Union School Section No. 1, in Burgess, and No. 2, in Bathurst*, 28.

2. *School teacher — Order on municipality for his salary — Acceptance of treasurer — Refusal to levy rate — Right of action.*]—*Held*, that an action would not lie against a municipal corporation by a school teacher, upon an order made upon and accepted by the treasurer in the plaintiff's favour for his salary, the treasurer having no power to bind the corporation by such acceptance. *Held*, also, that the teacher could not maintain an action against the corporation for refusing to levy a rate for his salary, upon an estimate furnished to them for that purpose by the trustees. *Smith v. The Corporation of the Village of Collingwood*, 259.

3. *School sections — Alteration — Notice — By-laws.*]—On the 19th of December, 1857, a township council passed a by-law creating a new school section, called No. 9, out of sections 13 and 8, and defining what should thereafter constitute section 13. Notice was given of the intention to pass this by-law, but it was not done at the request of the freeholders and householders expressed at a public meeting; on the contrary, the change made appeared to be opposed to the wishes

of a majority of the inhabitants. On the 8th of May, 1858, a by-law repealing it was passed, of which no notice had been given to the parties interested, thus restoring the sections to their former position, and on the 10th of September, 1859, another by-law was passed assessing the section 13 as it originally stood, for the expenses of building a school house, &c. *Held*, that the by-law of May, 1858, must be quashed, for the previous by-law was legal, and a by-law repealing it, which would in effect make an alteration of school sections, could not be passed without notice to those interested; and that the by-law levying a rate on section 13 as it stood before 1857 must necessarily be quashed also, for that would include part of what was section 9. *Shaw et al. and the Corporation of the Township of Manvers*, 288.

4. *Rate levied by trustees — Voluntary subscriptions.*]—The freeholders and householders of a school section cannot substitute a voluntary subscription among themselves for the expenses of the school, instead of the provisions made by law; and a resolution to have such subscription, and that the trustees neglected to collect it, is therefore no answer to an avowry for a rate levied by them in the usual way. *McMillan v. Rankin et al.*, 356.

5. *School trustees and teacher — Arbitration — Mandamus.*]—The court refused a mandamus to compel school trustees to pay a sum awarded to be due to a teacher for arrears of salary, observing that under the statute the arbitrators could levy the sum by warrant, which was *primâ facie* the proper course, or that the municipality could collect it by rate if requested. Upon the facts also, which are stated

in the case, the legality of the award appeared doubtful. *O'Leary and the Trustees of School Section No. 2, in the Township of Blandford*, 556.

6. *School Trustees and teacher—Arbitration between—Power of arbitrators—Personal liability of trustees.*]—*Declaration*, for converting the plaintiff's goods. *Plea*, that during 1859 the plaintiff was one of the trustees for a certain school section, the trustees of which for 1857 had employed one F. as a teacher by agreement under their corporate seal: that differences having arisen between the trustees and F., they were, in 1859, referred to arbitration under the provisions of the statute, and the arbitrators awarded that there was due to F. £25 4s. 9d.: that the trustees should pay F. that sum, with £14 for costs of the arbitration, out of the funds of the school section within thirty days; and that if they should refuse or neglect to do so they should be personally liable for the same: that they did neglect and refuse to pay, and to exercise their corporate powers to collect the sum required, and therefore the arbitrators issued their warrant to levy the same out of the funds of the section, which was returned *nulla bona*: that the arbitrators then summoned the plaintiff and the other trustees to shew cause why a warrant should not issue against their property for the amount: that the plaintiff having appeared and shewn no sufficient cause, they adjudged that the plaintiff and the other trustees were personally liable, and should pay the sum awarded, together with £5 6s. for subsequent costs; and that afterwards they issued a warrant to levy this amount from their goods, under which the plaintiff's goods were seized and sold, which is the grievance complained

of. *Held*, on demurrer, plea bad for, 1. The arbitrators had no power to award costs. 2. Nor that the sum should be paid within thirty days. 3. Nor to resume consideration of the matter, after having once made their award. 4. Nor to decide that the trustees were personally liable.

Trustees cannot be held liable unless they wilfully neglect to do their duty, not where they decline in good faith to exercise their corporate powers, on account of any doubt or legal difficulty which they suppose to exist. *Vanburen v. Bull et al.*, 633.

School trustees and school teacher—not within the Master and Servant Act, 10 & 11 Vict., ch. 83.]—See CONVICTION.

CONDITION.

See PRINCIPAL AND SURETY, 2.—SALE OF LAND, 2, 4—WILL, 3.

CONFLICT OF LAW.

See WILL, 3.

CONSPIRACY.

Indictment for conspiracy and fraud at election—Right of challenge—Affidavits of jurors—Evidence of accomplice—Application for new trial—Evidence of conspiracy.]—Upon an indictment for conspiracy to procure by fraud the return of one F. as a member for the Legislative Assembly, *Held*, 1. That the Crown was entitled to challenge any of the jurors peremptorily, without assigning a cause, until the panel had been exhausted. 2. That affidavits made by some of the jurors that the jury were not unanimous, but believed that the verdict of the majority was sufficient, could not be received as ground for a new trial. 3. *Semble*, that a conviction upon the evidence

of an accomplice not corroborated by other testimony is not illegal; but *held*, that in this case such evidence was clearly confirmed, and that the verdict against all the defendants was warranted. 4. Where several defendants have been convicted, a new trial if granted must be to all. 5. It is clearly unnecessary to prove that all the defendants, or any two of them, actually met together and concerted the proceeding carried out; it is sufficient if the jury are satisfied from their conduct, and from all the circumstances, that they were acting in concert. *Regina v. Fellowes et al.*, 48.

CONTRACT.

See AGREEMENT.—GUARANTEE.—
SALE OF LAND.

CONVICTION.

Master and servant—Conviction—Application to quash nunc pro tunc—Limitation of action where conviction quashed.—The Master and Servant Act, 10 & 11 Vic., ch. 23, does not apply to the case of school trustees and school teacher. Where a trustee, therefore, had been convicted under it as a master, the conviction was quashed.

Owing to a mistake in the Crown Office, a rule to return the writ of *certiorari*, and afterwards a rule for an attachment, issued, although a return had in fact been filed. More than six months having thus expired since the conviction, the court were asked to allow process to issue against the justice for the illegal conviction as of a previous term, but the application was refused.

Quere, whether the six months could be held to run only from the time of quashing the conviction. *In re Lawrence Joice, convicted by Robert Anglin, J. P.*, 197.

CORPORATIONS.

See HARBOUR COMPANY.—MUNICIPAL CORPORATIONS.

COSTS.

See ARBITRATION AND AWARD, 1.—
MISTAKE.

COUNTY COURT.

Plea bringing title in question—Practice.—In the county court a plea was pleaded bringing title to land in question, and after a verdict for the plaintiff a new trial was granted, on the ground that the court had no jurisdiction. On appeal the judgment was reversed, as the court having no jurisdiction could not grant a new trial.

The absence of the affidavit required by the statute with such plea will not warrant the court in proceeding, but would be ground for setting aside the plea. *Campbell v. Davidson*, 222.

Action by county court judge for fees as commissioner for taking evidence in contested election for Legislative Council—Statute giving him fees held not to extend to that house, and that without the statute he could recover nothing for the services rendered.—See ELECTIONS.

COUNTY TOWN OF PEEL.

Selection of, under 19 Vic., ch. 66.—See PEEL, (COUNTY OF.)

COVENANT.

See COVENANTS FOR TITLE.—
DIVISION COURT BAILIFF.—SALE OF LAND, 2, 3.

COVENANTS FOR TITLE.

Sale by sheriff—Effect of sale on such covenants—Action by covenantee after sale of his interest—New trial refused.—Plaintiff sued defendant

on a covenant for seisin and right to convey, and defendant pleaded only that he was seised and had good right to convey. It appeared that the plaintiff's interest in the land had been sold by the sheriff to one McGrogan, and that the plaintiff had previously mortgaged it to one McCallum, and the plaintiff's attorney, being called by defendant, swore that this suit was authorised by the plaintiff to be brought in his name for the benefit of McGrogan, and that he, witness, also represented the mortgagee, who was to be paid out of the verdict. The sum paid by McGrogan, with the mortgage money, amounted to nearly the purchase money paid by plaintiff to defendant, with interest, for which the jury gave a verdict. On motion for a new trial, with leave to amend the pleadings, it was objected that the plaintiff could not recover, as the covenant running with the land had passed to McGrogan, and that the damages were excessive; but the court refused to interfere, the verdict being just. *Quere*, whether a purchaser at sheriff's sale acquires a right to sue on covenants running with the land. *Campbell v. Burley*, 204.

COVENANT FOR RENEWAL OF LEASE.

Lease by corporation — Action against them on covenant to renew — Plea, that renewal was forbidden by decree in Chancery. — To an action against a municipal corporation for not renewing a lease pursuant to their covenant contained in it, defendants pleaded that they had no authority to make the lease, as defendant, who was an inhabitant of the town, well knew when he took it; and that before the term expired a decree was obtained

against them in Chancery, of which defendant had notice before this action, declaring that the land in question was dedicated for a market square only, and that this lease had been granted without authority, and should not be renewed. *Held*, on demurrer, no defence. *Wade v. The Corporation of the Town of Brantford*, 207.

CRIM. CON.

Criminal conversation — Proof of marriage. — To a declaration alleging "that the defendant debauched and carnally knew the wife of the plaintiff," defendant pleaded only not guilty. *Held*, that upon this issue it was not necessary to prove that the woman was the plaintiff's wife. *Ford v. Langlois*, 312.

CRIMINAL LAW.

See CONSPIRACY. — CONVICTION. — EMBEZZLEMENT. — LIBEL. — PERJURY.

CROSSINGS.

Duty of municipal corporations to maintain. — *See* MUNICIPAL CORPORATIONS, 1.

CROWN LANDS AGENT.

False representations by, and collusion, in order to obtain increased price on Crown land — Right of action. — *See* ACTION, 1.

CROWN GRANT.

See DESCRIPTION OF LAND.

DAMAGES.

Measure of, in action by assignee of sheriff on bond to the limits. — *See* LIMITS, 4. — INTERPLEADER.

DEED.

See DESCRIPTION OF LAND. —
PARTNERSHIP.—SALE OF LAND, 4.

DELIVERY.

See SALE OF GOODS.

DEMAND,

Of interest under mortgage—Necessity for demand on all the mortgagors.]—See MORTGAGE.

Of possession.]—See NOTICE TO QUIT.

DEPARTURE.

See LIMITS, 1, 2, 3, 4.

DESCRIPTION OF LAND.

Grant — Description of land — Construction.]—The Crown in 1804 granted lots 18 and 19 in the 6th concession of Fredericksburgh, containing by admeasurement 247 acres, more or less, and butted and bounded as follows: “commencing in front of the said concession at the S. E. angle of said lot 19: then N. 31° W. sixty-five chains; then S. 59° W. 38 chains, more or less, to the allowance for road between lots 18 and 17; then S. 31° E. 65 chains, more or less, to the allowance for road in front of the said sixth concession; then N. 59° E. 38 chains, more or less, to the place of beginning. Held, to include all of lots 18 and 19, not merely that part extending 65 chains back from the front or south end. Cartwright v. Detlor, 210.

In conveyance of old road allowance by surveyor of highways.]—See HIGHWAY.

Mis-description of defendant's interest, in sheriff's deed of land.]—See LEASE, 2.

In sheriff's deed on sale for taxes.]—See TAXES.

DESCRIPTION OF GOODS.

See CHATTEL MORTGAGE, 1, 2.

DISTRESS.

Proof of, to avoid sale for taxes.]—See TAXES.

DEVISE.

See WILL.

DIVISION COURT.

1. *Division court bailiff—Action on bond against his sureties—Right to sue jointly — Wrongful seizure — Interpleader issue.]—Declaration against a bailiff of a division court and his sureties, on the covenant entered into by them in pursuance of the act, (Con. Stats., U. C., ch. 19, sec. 25,) alleging that the bailiff, having a writ of execution against one B., under pretence thereof wrongfully seized and sold the plaintiff's goods, and received the proceeds of such sale: that the plaintiff having claimed the goods, and having sued the bailiff in the county court for such seizure, the bailiff, for the purpose of trying the title to the said goods and the proceeds thereof, issued an interpleader summons, on which the judge of the division court determined that the plaintiff owned the goods, and was entitled to the money received by defendant, with the costs: that thereupon it became the duty of the bailiff to pay the same to the plaintiff, yet he refused so to do, whereupon the plaintiff proceeded with his suit in the county court, and issued execution thereon, which was returned nulla bona; and so the plaintiff alleged that the bailiff had neglected to pay said money so received by him as such bailiff to the plaintiff, being the party entitled thereto, and had*

misconducted himself in his office, to the plaintiff's damage. *Plea*, by the sureties, that the said bailiff did pay to the plaintiff all the money he had received by virtue of his office, to which the plaintiff was entitled, and had not misconducted himself to the damage of the plaintiff in any suit or proceeding to which the plaintiff was a party. *Held*, on demurrer to the declaration, 1, that the defendants could be properly sued on the covenant in a joint action; but 2. *McLean, J.*, dissenting, that no cause of action upon the covenant was shewn: that the wrongful act of the bailiff, in seizing by mistake the goods of a stranger, was not misconduct or neglect of duty for which his sureties were liable; that the money received by him, though not received for the plaintiff at first, became the plaintiff's by virtue of the interpleader order, but (*McLean, J.*, dissenting on this point only,) that the plaintiff had lost his right to sue for it upon the covenant by proceeding with the county court action and obtaining judgment there. *McArthur v. Cool, Nixon and Stafford*, 476.

2. *Bond given by clerk of Division Court—Right of action by bailiff thereon—13 & 14 Vic., ch. 53.*—The bailiff of a division court may sue the sureties for the clerk, upon the bond given under 13 & 14 Vic., ch. 53, for fees on the service of summonses, executions and warrants, received by him for the bailiff and not paid over.

In the declaration in such a case, it is not necessary to specify the names of the parties from whom, or the suits in which, the moneys claimed were received.

Whether the money received was payable before action brought, or whether the clerk was justified in withholding it under the act,

is a question of evidence as to each sum. *Cool v. Switzer et al.*, 199.

DOWER.

1. *Informal issue—Allegation of demand—Evidence of offer to assign.*—To an action of dower, alleging a demand made pursuant to the statute, the tenants pleaded *tout temps prist*. The demandant replied that she requested her dower more than one month and less than one year before action, but that the tenants did not endow her, and that the judgment for the said damages and endowment shall wait till the said issue is tried. The tenants joined issue. The evidence proved a demand, and that the tenants said demandant might have her dower, but did nothing. *Held*, that an issue was sufficiently formed upon the record, and that upon the evidence the demandant was entitled to a verdict, and to costs. *Reid v. Foster et al.*, 298.

2. *Land required for military purposes—Ordinance vesting act, 7 Vic., ch. 11.*—To an action of dower the tenant pleaded, that the husband in his life time, in the year 1823, granted certain land to the king: that from thence until the passing of 7 Vic., ch. 11, the Crown continued seised of said land for purposes connected with the military defence of the province, and the same was during all the time aforesaid duly set apart and occupied for the said purposes: that by the 7 Vic., ch. 11, the said land was vested in the principal officers of ordnance, for the service of said department, &c.: that the lands in the declaration mentioned formed part of the said land, and were part of the land on which a great part of Bytown had been built, as mentioned in the fifth clause of that statute, and at the passing of the

act was one of the building lots mentioned in said section, and was held under said officers by the tenant in this suit; and that under the powers contained in the sixth section the said officers in 1844 conveyed the land to the said tenant, to be held by him and his heirs for ever, clear of all charges and encumbrances of whatsoever kind or nature, as by the said statute they were empowered to do. By the 7 Vic., ch. 11, sec. 1, the land in question was vested in the principal officers of ordnance, but it was provided that nothing in the act should be taken to affect any right, title, or claim, vested in or possessed by any person at the passing of the act, nor to give them a better title than was then vested in the Crown; and the sixth section enacted that the said officers might convey this land, which had for some time been held by the tenant under them, "to be held as freeholder for ever, and clear of all charges and incumbrances of whatsoever kind or nature." *Held*, on demurrer, that the plea shewed no defence, for the demandant's right was not extinguished by the conveyance to the Crown, nor by the provisions of the statute. *Begley and wife v. Gibson*, 458.

DRAIN.

Insufficient construction of by lessee—Injury to adjoining premises—Liability of assignees of lessee.—See ACTION, 2.

EJECTMENT.

1. In ejectment brought upon a mortgage, it appeared that before the mortgage was given defendant became a tenant of the mortgagor for a year. *Held*, that at the end of that time his right ceased, and that the mortgagees could eject

him without notice. *The Canada Permanent Building and Savings Society v. Rowell*, 124.

2. *Notice of title—Admission.*—Where defendant in his notice of title claimed as purchaser through one M., and the plaintiff in proving his title put in a lease from M. to himself, *Held*, that it was unnecessary for defendant to shew M.'s title. *Brandon v. Cawthorne*, 368.

3. *Order to substitute one defendant for another—Record made up against both—Irregularity—Evidence of title.*—Ejectment having been brought against A., B. was by judge's order allowed to defend in his place, and the issue book and notice of trial were served as against B. alone, but A.'s name was inserted in the record as a co-defendant. A verdict having been found for the plaintiff, on motion in term an affidavit was filed that B.'s attorney was not aware of A.'s name being on the record until after the trial had commenced, and that B. had been prejudiced in his defence by being deprived of A.'s evidence. The court set aside the record and verdict for irregularity.

The plaintiffs claimed under a mortgage from A., whose title B. denied; and, *semble*, that upon the evidence set out in the case, the verdict could not have been supported. *Peebles et al v. Lott-ridge and Potts*, 627.

By Building Society—In whose name to be brought.—See BUILDING SOCIETY, 2.

See DESCRIPTION OF LAND—LIMITATIONS, (Statute of)—MARRIED WOMAN.—NOTICE TO QUIT.—RAILWAYS.—TAXES.

ELECTIONS.

Legislative Council—Contested election—Action by commissioner for fees.—The 20 Vic., ch. 23, does

not extend to elections for the Legislative Council. Where a county court judge, assuming that it did so extend, acted at defendant's request as commissioner for taking evidence in a contested election for that body: *Held*, that he could recover nothing for his services. *Burritt v. Jones*, 194.

See CONSPIRACY.

EMBEZZLEMENT.

Evidence—Money received by county treasurer for township—Indictment.]—On an indictment against a treasurer of a county for embezzling the sum of £9 14s. 10d., received for taxes, it appeared that defendant received the money in October, 1858, and resigned in February, 1859, when his books were taken from him by the warden, although the usual time for making up his account with the county, 31st of March, had not arrived. This sum was not entered in his books as received, nor was there any entry of other moneys received for taxes at a later date; but after his books had been taken he sent in a list of moneys received, including this, although before he did so it had been stated in a newspaper that this and other payments were not accounted for. There was no proof that he was indebted to the county on the whole of his accounts, and it was shewn that he claimed that they were in his debt, and that the question was pending before arbitrators, to whom several civil suits between himself and the council had been referred. The jury found defendant guilty. *Held*, that the evidence did not warrant the conviction, and a new trial was granted. *Held*, also, that the money was not improperly charged to be the money of the county, though it was received for the township of

Maidstone, and was to be accounted for to it by the county. *Regina v. Bullock*, 513.

ENTAIL.

Will—Construction—Estate tail or for life—Right of tenant in tail to convey in fee.]—See WILL, 4.

EQUITABLE PLEADINGS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.—MISTAKE.—MUNICIPAL CORPORATIONS, 3.—SALE OF LAND, 3.

ESCAPE.

Liability of sheriff for escape on bond to the limits, because bond has not been allowed, although debtor has not left the limits.]—See LIMITS, 5.

ESTATE.

Lease—Construction—Estate for life or for term of years.]—See LEASE, 2.

Will—Estate for life or in fee.]—See WILL, 2.

Will—Estate tail or for life—Conveyance in fee by tenant in tail.]—See WILL, 4.

ESTOPPEL.

1. *Personal property—Devise in trust for widow and children—Execution against her—Sale—Estoppel.*]—One W. devised all his personal estate to three trustees, of whom his widow was one, in trust to call in and convert the securities into money, and when received to invest the same as they should think best, and pay the interest and produce thereof to his widow during her life, for the maintenance of herself and his children. The widow after the testator's death remained on his farm, and in possession of the stock and personal property, some of

which she sold, and the stock had been added to by breeding. A writ of execution came into the sheriff's hands against her, and while it was there the two other trustees took from her a mortgage of all the personal property for advances made by them to her. The sheriff afterwards seized under the writ, and the two trustees forbade the sale, but it went on, and one of them bought the goods, and took a bill of sale from the sheriff, against whom they then brought an action for the seizure. *Held*, that they were not estopped by having purchased at the sale, but that having taken the mortgage from the widow while the writ was in the sheriff's hands, they could not allege that the goods were not then hers; and therefore that they could not recover. *Held*, also, that the increase of the stock must be subject to the same rule as the stock. *Seemle*, that the property was liable, in the widow's hands, to the execution, which for all that appeared might have been for a debt contracted for the support of herself and family. *Peers and Pearson v. Carrall, Sheriff*, 229.

2. *Ships—Mortgage—Estoppel.*]—B. owning a vessel mortgaged her to C., and C. assigned the mortgage, with his other property, to the plaintiff in trust for creditors. The plaintiff having brought replevin against B. to obtain possession: *Held*, that the defendant could not dispute the plaintiff's title, or set up that he was trustee for a foreign corporation who by law could not hold ships. *Paton v. Browne*, 337.

3. *Sheriff—Payment into court—Estoppel.*]—Where a plaintiff obtained an order to take out of court money paid in by the sheriff on condition that he should pay the

master's charges, and was given to understand that he might either take it on these terms or sue the sheriff for it, *Held*, that having availed himself of this order, he could not afterwards recover from the sheriff the fees paid to the master, on the ground that the money had been improperly paid into court. *Crombie v. Davidson (Sheriff)*, 369.

4. *Held*, that defendant having pleaded to the declaration as containing two separate counts, could not afterwards object that there was but one. *May et al. v. Howland et al.*, 66.

By pleading.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 5.

See LANDLORD AND TENANT, 1, 3.
—LIBEL, 1.—MUNICIPAL CORPORATIONS, 2, 3, 5, 6.—STOCK.

EVIDENCE.

1. *Action against maker and endorser—Evidence*—5 W. IV., ch. 1, sec. 9; 16 Vic., ch. 19.]—Where defendants being sued as maker and endorser of a promissory note, pleaded a defence shewing want of consideration, which if proved must equally discharge both, *Held*, *Burns. J.*, dissenting, that neither could be called as a witness for the other. *Moffatt et al. v. Robertson et al.*, 401.

2. *Witness—Competency—Con. Stats. U. C., ch. 32, sec. 5.*]—An assignee of the plaintiffs for the benefit of their creditors, *held* not an incompetent witness to prove a debt due to them, as being the person in whose immediate behalf the action was brought.

The exception in the statute applies only to those in whose behalf as *beneficially interested* the suit is brought. *McMullin v. Murdoff*, 506.

Conviction upon evidence of accomplice.]—See CONSPIRACY.

See ACTION 2.—ARBITRATION AND AWARD, 1.—BILLS OF EXCHANGE AND PROMISSORY NOTES 3, 4.—CRIM. CON.—DOWER 1.—EJECTMENT, 2, 3.—EMBEZZLEMENT.—INSURANCE, 1, 2.—INTERPLEADER, 2.—JUSTICE OF THE PEACE.—LANDLORD AND TENANT, 2.—LIMITS, 2, 5.—MORTGAGE.—OVERHOLDING TENANT.—PRINCIPAL AND SURETY, 2.—SALE OF LAND, 2.—STOCK.—TAXES.—WILL, 1.

EXECUTION.

Mortgagee of chattels—Right to sell his interest under.]—See ASSIGNMENT, 3.

School house cannot be sold under judgment against trustees.]—See COMMON SCHOOLS, 1.

See ESTOPPEL, 1.—LEASE, 2.—LIEN.—MISTAKE.—SALE OF GOODS, 1.—SATISFACTION.—TRESPASS.

FALSE REPRESENTATION.

By Crown land agent, in order to obtain increased price on public land.]—See ACTION, 1.

FILING.

Assignment of goods.]—See ASSIGNMENT, 4.

FIRE.

Accidental fire—Liability—14 Geo. III., ch. 78, sec. 86.]—Defendant occupied a stall in a market, the cellar beneath which was used by the plaintiff to keep goods in. He went out, leaving a fire in his stove, with no one to watch it, and a block of wood too close to the stove. A fire broke out which burned through the floor, and destroyed the plaintiff's goods below, and the jury found that such fire

was occasioned by defendant's negligence. *Held*, that it was nevertheless an *accidental* fire, within the 14 Geo. III., ch. 78, sec. 85, and that defendant was not liable. *Gaston v. Wald*, 586.

FIXTURES.

Hay scales—Fixtures as between vendor and vendee.]—One J. sold the land in question to W., who took possession under the contract for sale, and erected a set of hay scales, partly upon it and partly upon the street. A pit was dug about three feet deep, which was boarded inside, and posts were let into the soil to hang the scales upon and as rests. The platform rested upon posts thus let in, and hung upon hooks in the posts, so that the scales might be removed by lifting it up, without disturbing the posts or boards. The earth was banked up on the outside, so that teams could drive upon the platform. W. could not carry out the contract, and with his consent J. sold the land to the plaintiffs, and conveyed it to them by a deed in the usual form, in which nothing was specified as to the hay scales. The defendants, W. and another, having removed them, taking away all except the posts, *Held*, that they were not fixtures as between J. and his vendees, the plaintiffs, and that they therefore did not pass by the conveyance. *Markle et al. v. Houck and Winkler*, 164.

FORFEITURE.

See LEASE, 2.

FRAUDS (Statute of.)

See SALE OF LAND, 1.

GOODS.

See SALE OF GOODS.

GUARANTEE.

Sale of goods by sheriff—Guarantee—Effect of on time for payment—Executions—Attachments—Priority.]

—The sheriff held several executions against one P., on which no seizure was made until after he had absconded and several writs of attachment had issued. After the attachments an execution came in at the suit of defendant, and the sheriff then seized P.'s goods under all the writs, and defendant at the sale purchased a large quantity of lumber. The sheriff would not allow him to take it away without paying; but defendant contended that his execution was entitled to priority over the attachments, and that as other goods had been sold sufficient to satisfy the previous executions, he was himself entitled to the money. An application was then pending by one of the attaching creditors against defendant's judgment, which it was thought would determine the question of priority, and the sheriff agreed to let defendant take the lumber on receiving a guarantee from the Bank of British North America that they would be responsible for the payment when and if it should be decided that the sheriff was not entitled to apply the proceeds of the sale on account of defendant's execution. Afterwards the sheriff returned the defendant's writ *nulla bona*, for which an action was brought against him by this defendant, and a verdict recovered for more than the amount payable for the lumber. *Held*, that the sheriff was entitled to recover from the defendant the purchase money for the lumber, without waiting until the question of priority between his writ and the attachment had been decided, for that condition applied only to the liability of the bank under their guarantee.

As to the question of priority, see *Potter v. Carrall*, (9 C. P. 442, the suit for the false return above referred to,) commented upon in this case, and which now stands for judgment in the Court of Appeal. *Per Robinson*, C. J., the defence that the time of payment had not arrived by the terms of sale was clearly admissible under the general issue. *Carrall v. Potter*, 346.

The judgment of the Common Pleas has since been affirmed in appeal, *Robinson*, C. J., *McLean*, J., and *Spragge*, V. C., dissenting.

See PRINCIPAL AND SURETY, 2.

HARBOR COMPANY.

1. *Liability for obstructions to entrance—Con. Stats., U. C., ch. 50.*]
—Defendants, a Harbor Company, incorporated under the Con. Stats., U. C., ch. 50, constructed two piers running out into lake Erie, and had for some time collected tolls upon vessels, though it was said that the harbor was not finished, and that it was intended to carry the piers further out. The plaintiff's vessel, bound for another port, met with an accident, and having attempted in consequence to enter this harbor, was wrecked upon a sand-bar, which had formed about two hundred feet outside of the piers, and the cargo was lost. It appeared that this sand-bar was of a shifting nature, disappearing and forming at different times, but it was proved that defendants some weeks before the accident had begun to remove it, and had not gone on with the work. The jury having found that the loss was caused by defendants' negligence, *Held*, that defendants were liable, and the verdict for the value of the plaintiff's cargo was upheld. *McLean*, J., dissenting, *Webb v. Port Bruce Harbor Company*, 615.

2. *Per Draper, C. J.*—By beginning to receive tolls, the company must be taken to assert that their harbor is capable of receiving and sheltering vessels of such size as it is fitted for. This includes the approach to the harbor; and if afterwards an obstruction from natural or other causes renders it within their knowledge unsafe to attempt an entrance, they are bound either to remove the obstruction, or to close the harbor, by giving notice to the public that it cannot be safely approached.

Hagarty, J., thought the weight of evidence strongly against the plaintiff, but concurred in the judgment, holding that to be no ground of appeal. He considered, however, that the verdict could be sustained only upon that part of the evidence which tended to shew that defendants had undertaken to remove the bar in question; and that if it were a known natural obstruction, outside of their harbor, which they had never professed to interfere with, then they would not be liable. *The same case*—*affirmed on appeal*, 623.

HIGHWAY.

Conveyance of old road by surveyor—*Right to convey*—*Uncertain description.*—In ejectment for land described as being formerly a public highway from W. to C., it appeared that before 1835 there had been a trespass road between those places, running across defendant's lot. In that year a road was laid out and sanctioned by the quarter sessions, intended as a substitute for the former one. Defendant then enclosed a portion of the old road, and had been in possession of it for more than twenty years, but a small piece remained not enclosed, and the plaintiff claimed this under a deed which he re-

ceived from the surveyor of highways in 1837, purporting to convey to him "the public highway or road from W. to C.," as described by metes and bounds. *Held*, that the surveyor had no right to sell the old road, as it was not a public road allowance nor a legal highway, and that the plaintiff, therefore, could not recover.

Semble, that the description in the deed to the plaintiff, set out below, was too uncertain to convey any thing. *Clapp v. Haight*, 94.

See MUNICIPAL CORPORATIONS, 1, 4, 6.

HUSBAND AND WIFE.

See MARRIED WOMAN.

ILLEGALITY.

Bond—*Condition in restraint of trade*—*Consideration must be shewn in declaration.*—See ARBITRATION AND AWARD, 3.

INDEMNITY.

A person who indemnifies the sheriff for seizing goods does not by that act become liable as a trespasser. *McLeod et al. v. Fortune et al.*, 98.

INDIAN LANDS.

Power of commissioners—2 Vic., ch. 15; 12 Vic., chaps. 9, 30; 13 & 14 Vic., ch. 74; 20 Vic., ch. 26.]—*Semble*, that the commissioners for restraining trespasses on Indian lands are not authorised to seize and sell timber cut by the Indians themselves, or by white people with their consent. *Vanvleck et al. v. Stewart et al.*, 489.

INDICTMENT.

See CONSPIRACY.—EMBEZZLEMENT.—PERJURY.

INSOLVENCY.

Priority as between executions and attachments against absconding debtor.]—See GUARANTEE.

Of debtor, effect of in action for his departure by assignee of sheriff on bond to the limits.]—See LIMITS, 4.

See ASSIGNMENT—SALE OF GOODS, 2.

INSURANCE.

1. *Interest of plaintiff in the property—Double insurance—Second insurance on different interest, and not by plaintiff—Over-estimate of loss—Evidence.*]—The plaintiff, in an action on a policy of insurance, averred that at the time of effecting the policy he was interested in the property insured: that his interest was before the loss assigned by him to one B., which assignment was accepted by defendants; and that until the loss B. continued interested, and the plaintiff as trustee for him. Defendants did not demur, but pleaded:—1, that at the time of the loss the plaintiff had no interest; and 2, that before the fire he assigned the policy to B., without having the transfer endorsed, and without defendants' consent. It appeared that the statement in the declaration was true: that is, that the plaintiff had assigned his interest to B., which assignment was approved by defendants. *Held*, that the plaintiff was entitled to succeed on the issue.

The third plea alleged that the plaintiff had effected another insurance in the A. Co., without notice to defendants or endorsement on their policy. The evidence shewed that this policy was effected by one S., (whose interest in the property did not appear,) in

his own name, and assigned by him to B. *Held*, that the plea was not proved, for the insurance complained of was not shewn to be by or for the plaintiff, or of his interest, which would be necessary to avoid the plaintiff's policy.

In the sixth plea defendants set up as a defence, that after the fire the plaintiff, in making his claim, had misrepresented and over-stated the amount of his loss, contrary to the form and effect of the condition in the policy. *Held*, that to sustain this plea it was necessary to prove that the over-estimate did not arise from mistake or inadvertence, but was made designedly, for the purpose of obtaining a larger sum than the loss really sustained, or to prevent close enquiry.

Held, upon the evidence set out below—it being probable that the loss, though over-estimated, was equal to the sum insured, and there being circumstances which might explain the over-charge—that the jury were warranted in finding for the plaintiff. *Park v. The Phoenix Insurance Company*, 110.

2. *Further insurance without notice—Reasonable time.*]—See the facts of the case stated, 17 U. C. R. 35. The jury having a second time found for the plaintiff, a new trial was granted without costs.

The further insurance having subsisted for fourteen days only before it was cancelled, it was argued that a reasonable time must be allowed to give notice of it to the plaintiffs, and procure the endorsement, and that this was a question for the jury; but, *per Burns, J.*, the question was not properly presented by the pleadings, and that the plaintiff having given no notice at all, though he had ample time to do it, the question of reasonable time could not arise.

It was contended also that the second insurance was void, owing to an omission by the plaintiff to comply with its conditions, but *held* that it was nevertheless an insurance within the meaning of the condition in defendants' policy. *Jacobs v. The Equitable Insurance Company*, 250.

3. On a third trial of this case a verdict was found for the defendants, the learned judge having charged that the defendants had proved their plea, and not left it to the jury to say whether the plaintiff had given notice to them of the further insurance within a reasonable time. The court held the direction right, and refused a rule. *The same Case*, 257.

4. *Insurance—Affidavit and certificate of loss—Time of furnishing—Reasonable time, whether a question for the court or jury—Interest of plaintiffs.*—The plaintiffs brought an action against these defendants on a policy of insurance, which provided that the assured should "give immediate notice of any loss or damage by fire within fourteen days, to the agent of the company," &c., &c., and, "as soon after as possible," should deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation: * * that they should also make a declaration and produce certain certificates specified; and that until such proofs, declarations and certificates were produced, the loss should not be payable. At the trial the notice required was proved, but the certificate and affidavit produced were afterwards held by the court to be insufficient, and a nonsuit was entered. The plaintiffs then, about eleven months after the fire, furnished a new and sufficient affidavit and certificate, and brought

another action, in which the defendants pleaded that the plaintiffs did not as soon after the fire as possible deliver these papers. It appeared that when the first papers were furnished, defendants objected to their sufficiency, and that others were a few days after delivered, to which it was not shewn that the plaintiffs were notified of any objection until the first trial. *Held*, that the words "as soon as possible" must be construed to mean within a reasonable time under the circumstances; and, *Burns, J.*, dissenting, that it was properly left to the jury to say whether, considering all the facts, the defendants had complied with the condition by furnishing the second set of papers, and was not a question of law upon which the judge should have decided.

The plaintiffs, while in partnership, had purchased the land, on which they afterwards built the mill in question, which was burned, from one A., who held their bond for the balance of purchase money. Before the fire they dissolved partnership by a deed, in which it was agreed that Mann should wind up the business, and should hold "the mill property" for his own use, but no regular conveyance of it had been executed. *Held*, that Hobson had sufficient interest to enable him to join in suing on the policy.

Held, also, that the affidavit and magistrate's certificate last furnished were sufficient, though Mann, who alone made the affidavit, was described as solely interested in the property, and the certificate stated the loss as his only. *Mann and Hobson v. The Western Assurance Company*, 314.

5. *Abandonment—Non-payment of premium note—Judgment of C.*

P. on same pleadings conformed to.]

—Declaration on a policy of insurance on a ship, alleging a total loss, and that the plaintiff abandoned the vessel to defendants, who accepted such abandonment. *Pleas.*

—2. That the vessel ran upon a reef of rocks and was stranded, which is the loss in the declaration mentioned: that after she stranded the plaintiff should have used prompt and efficient means for her safe-guard and recovery, and repaired her when recovered, yet that he neglected to do so, and thereupon, according to the terms of the policy (which were set out in the declaration) defendants recovered and repaired her for the plaintiff, making her sound, and as good as before she was stranded, and offered to restore her to the plaintiff, on payment of his fair proportion of said repairs, but that the plaintiff refused to accept her; and that before making such repairs defendants caused a proper survey to be made according to the policy. 3. That the plaintiff did not abandon said vessel, nor did defendants accept said abandonment as alleged. 4. That said abandonment was not sufficient to convey to and vest in the defendants an unincumbered and perfect title to said vessel. 5. That the policy contained a condition, that in case the note given for the premium should not be paid at maturity, the full amount of said premium should be considered earned, and the policy become void while said note remained unpaid: that the plaintiff gave his note for the premium, which before sixty days had elapsed after proof of the loss, &c., and before the commencement of this suit, became due, and at the commencement of this suit was and is unpaid.

Another action had been brought

by this plaintiff in the Common Pleas against a different company, in which the pleadings and terms of the policy being similar, on demurrer to the pleas, the second and fifth pleas were held bad, and the third and fourth pleas good; and this court conformed to that decision, without entering into a consideration of the questions raised. *Meagher v. The Ætna Insurance Company*, 530.

INSURANCE COMPANIES.

See STOCK.—USURY.

INTEREST.

See PLEADING.—USURY

INTERPLEADER.

1. *Verdict for claimant—Subsequent action by him against execution plaintiffs—Excessive damages—Form of declaration.*—The goods of one L. having been seized under an execution at the suit of defendants, were claimed by the plaintiffs, and upon the sheriff's application a feigned issue was ordered, which directed that no action should be brought against the sheriff, but expressly excepted any claim which either the execution plaintiffs or the claimants might have against each other. This issue having been decided in the plaintiffs' favour, they brought an action against the defendants (the execution creditors) for the acts of the sheriff in entering and excluding them for two months from possession of the foundry where the goods were, and for stopping the work and preventing them from selling some of the articles which were being manufactured. The jury gave \$50 for the first cause of action, and \$300 for the second. *Held*, that the action would lie, and that the dama-

ges were not excessive. *Held*, also, that the defendants having pleaded to the declaration as containing two separate counts, could not afterwards object that there was but one. *May et al. v. Howland et al.*, 66.

2. *Evidence—Assignment—Provision for release, and for carrying on the business.*—On an interpleader issue to try the title to certain goods seized, the plaintiff claimed all, asserting that he had derived some by purchase from the assignee of the execution debtor, and others by subsequent purchase from third parties. The assignment being invalid: *Held*, that it was necessary for him to shew what goods he was entitled to without it, and on his failure to do this that the jury were rightly directed to find for defendants. *Crapper v. Paterson et al.*, 160.

3. *Interpleader order—Release of goods by sheriff—Action therefor—Order set aside—Pleading.*—The declaration complained that defendant, as sheriff under a *fi. fa.* at the plaintiff's suit, levied upon a certain quantity of bricks made by F., one of the defendants in the writ, whereupon one B. claimed them, and an interpleader order was made directing an issue, and that until payment into court of the value of the bricks, or security given therefor, defendant should continue in possession; yet that, though the money was not paid, nor security given, defendant wrongfully allowed the bricks to be removed by B. Defendant pleaded that the interpleader order was duly set aside; to which the plaintiff replied that the order contained a clause protecting the defendant against action, and that it was not set aside for informality, but at the plaintiff's instance, long after

the defendant had allowed the goods to be removed, and to enable the plaintiff to bring this action. *Held*, on demurrer to the replication, affirming the judgment of the county court, that the declaration was bad, for not averring that the bricks belonged to F., and that the replication was also bad, being no answer to the plea. *Dafoe v. Rutan, Sheriff*, 334.

See ASSIGNMENT, 3.—DIVISION COURT, 1.—SALE OF GOODS, 1.

ISSUE.

See DOWER, 1.

JOINT STOCK COMPANIES.

See HARBOUR COMPANY.—STOCK.

JUDGMENT.

See PRACTICE.—SATISFACTION.—SET-OFF.

JURIES.

Right of challenge by the Crown.—See CONSPIRACY.

Sheriff's fees for summoning.—See SHERIFF.

JURISDICTION.

Arbitrators having awarded where under the statute they had no jurisdiction, the court could not set aside the award.—See MUNICIPAL CORPORATIONS, 4

See COUNTY COURT.

JUSTICE OF PEACE.

Malicious prosecution—Proof of malice.—The defendant was a justice of the peace, and in the course of his duty as such acquired his knowledge of the circumstances on which he preferred the charge against defendant. *Held*, that he was clearly not entitled as a magis-

rate on that ground to require that express malice should be proved against him. *Orr v. Spooner*, 601.

KINGSTON.

Agreement between City of, and waterworks company of—Construction of.—See AGREEMENT.

LAND.

Description of in grant.—See DESCRIPTION OF LAND.

See ASSESSMENT.—SALE OF LAND.—TAXES.—HIGHWAY.—INDIAN LANDS.

LANDLORD AND TENANT.

Expiration of landlord's interest—Payment of rent afterwards with knowledge—Ejectment.—The plaintiff holding a lease under the Crown, which expired in 1854, executed a lease to defendant for six years from the 1st of April, 1845. After the expiration of his term he continued in possession, and paid rent as before, up to and for 1857, though, as the jury found, he was aware in 1856 that the plaintiff's term under his lease from the Crown had ceased. *Held*, that the plaintiff was entitled to recover in ejectment. *Couse v. Cline*, 58.

2. *Verbal lease—Action for rent—No occupation by tenant.*—The plaintiff's agent offered to lease a house to defendant at £100 a year, payable quarterly, and defendant assented to the terms, but never occupied. *Held*, affirming the judgment of the county court, that he was not liable for the rent.

After the argument an affidavit was put in, made by one of the witnesses examined at the trial, stating that after the defendant had been told what the rent would be he got the key by the agent's directions, and went to examine the house, and

leaving the key in the door returned and said he would take it. This evidence was not reported in the appeal books, and the witness did not swear that it was given at the trial. The court refused to act upon the affidavit; but, *semble*, that the facts stated in it could not have altered the decision. *The Bank of Upper Canada v. Tarrant*, 423.

3. *Replevin—Avowry—Pleading.*—*Replevin*—Defendant G. as landlord, and the other as his bailiff, avowed under a distress for rent due by T., to which the plaintiff pleaded that before making the demise the said G. and one E. owned the land, and before the taking complained of conveyed it to the plaintiff and R. in fee, who continued seised and entitled to the possession and rents until the demise and time when, &c.: that G. knowing the premises, fraudulently made said demise to defraud the plaintiff and R.: that by reason of the premises he had not at the said time any interest in the land; and that the plaintiff being entitled placed his goods there, where defendants wrongfully took them. *Held*, on demurrer, plea bad, being in effect a plea of *nil habuit in tenementis*. *Brown v. Garden and Gibson*, 518.

Insufficient construction of drain by lessee—Injury to adjoining premises—Liability of assignees of lessee.—See ACTION, 2.

See EJECTMENT, 1.—LEASE.—OVERHOLDING TENANT.

LEASE.

1. *Construction—Right reserved to lessor to build upon part of the land demised.*—Defendant leased to plaintiff "Sutherland's farm, being the west part of lot number 15, in the fourth concession of West

Zorra, as at present occupied by the said Sutherland" for eight years, at a yearly rent. It was provided by the lease that the plaintiff should not cut down timber for the purpose of clearing outside the brush fence, but might clear all within, and might use all the woodland on the said leased premises for pasture, and "that the said Sutherland" (the defendant) "shall be at liberty at any time to build and make any improvements he may think proper upon any portion of the said leased premises lying outside the said brush fence at present upon the said premises, without any diminution of rent or any consideration therefor." *Held*, that the defendant having improved and built upon a portion of the land outside of the brush fence during the term, was entitled to retain possession thereof. *Leonard v. Sutherland*, 301.

2. *Construction—Estate for life or for term of years—Merger—Sale under execution—Forfeiture.*—Defendant on the 13th of October, 1852, granted the land in question to one S., to hold "to the said S., and the heirs of his body, for twenty-one years, or the term of his natural life, from the 1st of April, 1853, fully to be complete and ended," but not to be underlet to any person, except to the family of the said S., for any period during the said term. A yearly rent was reserved, which S. covenanted to pay, and it was provided that on failure to perform the covenants the lease and the term thereby granted should cease and be utterly null and void. The lessee entered, and on the 1st of April, 1859, a year's rent being in arrear, defendant distrained and sold the goods of S., who remained for some time on

the premises as defendant's servant; and the sheriff afterwards, under executions which had been in his hands since November, 1858, sold the unexpired term of S. in the premises, describing it as a term with fifteen years yet to run, at a rent of \$100 a year. The plaintiff became the purchaser, and brought ejectment against defendant on the sheriff's deed. *Held*, that by the lease S. took a life estate, in which the term merged, and he therefore had no interest which the sheriff could sell under the *fi. fa.* against goods.

Per Robinson, C. J., the sheriff's deed would at all events have been inoperative, owing to the misdescription of the interest which S. held in the land, and of the amount of rent. *Per McLean, J.*, the plaintiff's title also failed, on the ground that the lease being void by the non-payment of rent, and S. having given up possession by arrangement with defendant, his interest was gone. *Dalye v. Robertson*, 411.

Action on covenant to renew—Plea, that renewal was forbidden by Court of Chancery.—See COVENANT FOR RENEWAL OF LEASE.

See LANDLORD AND TENANT.—OVERHOLDING TENANT.

LEAVE AND LICENSE.

To depart from the limits.—See LIMITS, 1, 2.

LEGISLATIVE COUNCIL.

See ELECTIONS.

LEGISLATIVE ASSEMBLY.

Power of Speaker by warrant to remove defendant from the limits, to attend as a witness before the house.—See LIMITS, 3.

LIBEL.

1. *Indictment for libel*—*Notice to prosecutor of intended publication*—*New trial*.]—Upon an indictment for libel, published at defendants' instance in a newspaper, it appeared that the editor, (who was not indicted,) before inserting the libel shewed it to the prosecutor, who did not express any wish to suppress the publication, but wrote a reply, which was also inserted. *Held*, not such a defence for the parties indicted as to render a conviction illegal, and a new trial was refused. *The Queen v. McElderry et al.*, 168.

2. *Pleading*.]—A plea to an information for libel under the Consol. Stats. U. C., ch. 103, sec. 9, must allege the truth of *all* the matters charged; and, *held*, upon the information and plea set out in this case, that the plea was clearly insufficient in that respect. *Regina v. Moylan*, 521.

 LIEN.

On chattels for work—*Assignment thereof*—*Chattel Mortgage Act*.]—One Robins had agreed to make for Ruthven, the execution debtor, an iron fence, for which Ruthven furnished him with the iron, and paid a certain sum on account of the work. Being unable to pay the balance, G. advanced the money, taking Ruthven's note; and the fence, which was then in Robins' yard, was delivered by Ruthven to him to hold for G. until payment of the note, but there was no written assignment. When the note fell due Ruthven authorised G. to sell the fence, but it remained until it was seized under an execution against Ruthven. *Held*, that the execution could not prevail against G.'s claim. *Gurney et al. v. James*, 156.

LIMITATIONS (STATUTE OF.)

1. *Statute of Limitations*—*Interruptions of possession*.]—In ejectment the plaintiffs proved a paper title to the land in question, which the defendant, the heir-at-law of the patentee, claimed by possession. It appeared that one B., in the spring of 1834, took possession of an acre of the same lot, which he agreed to purchase from one M., through whom the plaintiffs claimed, and built a house on it, in which he lived till 1844. The land in dispute lay between his acre and the river, and he was allowed to occupy and enclose it by the owner, whose title he always acknowledged, though not in writing. He left in 1844, and his house continued vacant for two years, the land in question remaining enclosed as before. The house and acre were then taken by a tenant under B., and occupied for three years together with this land, and after being vacant for three months two other tenants came in succession, and occupied the house until June, 1855, holding this land in the same way as B. and the others had done, when the defendant brought ejectment for the house and acre, and having recovered a verdict took possession of the land in question as well. *Held*, that the possession of B. and those succeeding him must be treated as continuous, notwithstanding the breaks in the occupation, and that a verdict was properly found for defendant.

B. having entered with the consent of the owner was tenant at will, so that the statute began to run at the expiration of a year; and the evidence shewed possession for twenty one years. *McLaren et al. v. Morphy*, 609.

2. *Boundaries*—*Possession*—*Mutual error*—*Statute of Limitations*.]

—The fact that both plaintiff and defendant were under a common error as to the true boundary of their lands will not prevent the Statute of Limitations from running against the true line, though it would be otherwise if it had been agreed upon between them that a certain line should govern whether correct or not. *Martin v. Weld et al.*, 631.

Of action against magistrate where conviction quashed.—See CONVICTION, 2.

LIMITS.

1. *Bond to the limits—Power of plaintiff's attorney to allow a departure—Effect of departure without plaintiff's leave.*—The plaintiff's attorney cannot authorise a departure of defendant from the limits, to which he has been committed on a *ca. sa.* *Semble*, that if defendant departs by the plaintiff's permission, and returns, the bond is not thereby gone. *Whittier, Assignee of the Sheriff of Huron and Bruce, v. Hands*, 170.

2. *Bond to the limits—Competency of deputy sheriff as witness to assignment—Departure with plaintiff's leave—Second departure—New assignment.*—The deputy-sheriff is, under the 4 Anne, ch. 16, sec. 20, a credible witness to the execution by the sheriff of an assignment of a bond to the limits. The debtor applied to the plaintiff's attorney for permission to leave the limits, in order to go to Toronto and obtain the money, and the attorney told him he would take no advantage if he wished to go for that purpose. He thereupon went, returned without effecting his object, and after remaining some time left the province. The plaintiff then sued upon the bond. *Held*, that there was no evidence to sustain a plea

that the debtor departed with the plaintiff's leave, and that it was unnecessary to new assign the second departure. *The same case*, 172.

3. *Bond to the limits—Departure under authority of Speaker's warrant.*—To an action on a bond to the limits, alleging a departure, defendants pleaded that the debtor, by virtue of a warrant of the Speaker of the House of Assembly, then in session, was required to leave the limits for the purpose of attending to be examined as a witness before said house, and that in accordance with said warrant, and to obey the same, he left the limits and remained away ten days, and immediately on his discharge therefrom returned. *Held*, on demurrer, no defence, as it was not shewn that the Speaker knew the debtor to be on the limits, or what occasion there was for requiring his attendance, or that any process had issued by which he was placed in custody of any officer while absent. *Brown et al. v. Paxton et al.*, 238.

4. *Bond to the limits under 16 Vic., ch. 175—Effect of—Action by assignee of sheriff—Measure of damages.*—In an action by the assignees of the sheriff against the sureties of one S., on a bond to the limits given under 16 Vic., ch. 175. *Held*, 1. That the bond continued in force after the expiration of the thirty days, and might be assigned and sued upon for a breach committed by departure after that period. 2. *Burns, J.*, dissenting, that the plaintiffs were not entitled as of course to the full amount of their debt and costs, but only to the loss actually sustained by the breach; and that in this case, as it was proved that the debtor was insolvent from the time of his arrest till his death, the verdict should be reduced

to nominal damages. *Calcutt v. Ruttan*, 13 U. C. R. 220, commented upon. *Brown et al. v. Paxton et al.*, 426.

5. *Bond to the limits—Loss of—Action for not assigning—Omission to procure allowance—Liability of sheriff—Immaterial issue—Pleading.*—One L. was ordered to pay the plaintiffs certain interlocutory costs in a suit which he had brought against them, and an attachment having issued against him he was arrested, and gave the usual bond to the limits. He had never left the limits, but neglected to get the bond allowed within thirty days, and the plaintiffs thereupon called upon the sheriff to assign the bond. Having lost it the sheriff was unable to assign by endorsement in the usual form, but he offered to prove the loss, and execute a separate assignment, or to give the plaintiffs authority to sue in his name. The plaintiffs declined this, and brought an action against him, alleging in one count refusal to assign, and in another charging an escape. Defendant pleaded to the first count that he was always ready to assign, but that the plaintiffs never required or tendered to him any assignment for execution, and that he gave them notice that they might sue on the bond in his name; and to the other count not guilty. There was also a count for not arresting, on which it was admitted at the trial that defendant must succeed. A verdict was by consent entered for defendant on all the counts, with leave reserved to move to enter it for the plaintiffs, if the court, draw the same inferences as a jury should think them entitled to recover. *Held*, that the defendant was entitled to a verdict on the first count, for though the plea might be immaterial, because the sheriff is

bound to prepare the assignment himself, yet the plaintiffs had not demurred but taken issue; and the action being without merits, if the jury had found for defendant judgment *non obstante* would not have been granted. But, *semble*, per *Robinson*, C. J., that the issue was not immaterial, for the plea might be taken to deny that the plaintiffs required the sheriff to assign, and the evidence shewed that on such an issue defendant should succeed. *Burns*, J., dissenting, on the ground that the plea being no answer to the first count, the plaintiffs, as the case was left, were entitled to have a verdict entered for them upon it. *Held*, also, that on the second count the plaintiffs could not recover, for the fact of the bond not having been allowed within the thirty days would not make the sheriff liable for an escape where the debtor remained on the limits. *Dougall et al. v. Moodie*, 568.

MAGISTRATE.

See CONVICTION—JUSTICE OF THE PEACE.

MALICE.

Necessity for proof of.—See JUSTICE OF THE PEACE.

MALICIOUS PROSECUTION.

See JUSTICE OF THE PEACE.—SET-OFF.

MANDAMUS.

See COMMON SCHOOLS, 5.

MARRIAGE.

See CRIM. CON.

MARRIED WOMAN.

One of the plaintiffs having married since the devise to her of the

and in question. *Held*, that she was not entitled by 22 Vic., ch. 34, to sue alone in ejectment, but that her husband must join. *Quere*, as to the effect of that statute upon the husband's right to possession of his wife's land where he is not tenant by the curtesy. *Scouler v. Scouler*, 106.

MASTER AND SERVANT.

See CONVICTION.

MEASURE OF DAMAGES.

In action by assignee of sheriff on bond to the limits.]—See LIMITS, 4.

MERGER.

See LEASE, 2.

MILEAGE.

Payable to sheriff for summoning jurors—Mode of computation.—See SHERIFF.

MISJOINDER.

See AMENDMENT.

MISTAKE.

Action for seizure under fi. fa. after release of the judgment—Equitable plea—Release awarded by arbitrators and executed by mistake—Demurrer.]—*Declaration*, that defendant recovered a judgment against the plaintiff, and issued a *fi. fa.* thereon, and afterwards, by an instrument under seal duly released the plaintiff therefrom, yet that defendant maliciously caused the sheriff to seize the plaintiff's goods under the writ, and would not direct him to stay, so that the plaintiff was obliged to pay a large sum of money to release them. *Plea*, on equitable grounds, that after the recovery of said judgment, and before the release, a *fi. fa.* was

issued thereon: that in ignorance of the issuing of said writ, and believing that all the costs on said judgment did not exceed £6 5s., defendant consented to refer all matters between himself and the plaintiff to arbitration: that the arbitrators awarded that the plaintiff should pay defendant £202, and should also pay to him the said costs, which they believed amounted only to £6 5s., and they directed that sum to be paid, in ignorance of the fact that said costs, with the sheriff's fees, in truth amounted to £15: that it was the intention of the arbitrators that all the said costs should be paid by the plaintiff, but neither they nor the defendant became aware of the mistake until after the time for moving against the award had elapsed: that in similar ignorance of these facts mutual releases were directed by the arbitrators, and defendant executed and delivered the release in the declaration mentioned: that before the trespass complained of defendant discovered the mistake, and requested the plaintiff to pay the balance of said costs to the sheriff, which he promised, but afterwards refused to do, and defendant thereupon, with the knowledge and privity of the plaintiff, who took no means to prevent the same, allowed the sheriff to obtain satisfaction of the said balance, as he lawfully might. *Held*, on demurrer, plea bad, as shewing no defence. *Held*, also, that it sufficiently appeared from the declaration that the seizure took place after the release, and that the objection was at all events removed by the plea. *Duross v. Duross*, 77.

In Crown office as to return having been made to certiorari—Application to quash conviction nunc pro tunc in consequence.]—See CONVICTION, 2.

Service of writ of summons by mistake on defendant's son of same name.—See SERVICE.

As to boundaries—Effect of on claim by possession.—See LIMITATIONS (Statute of) 2.

MONEY HAD AND RECEIVED.

See ACTION, 1.—SHERIFF.—STATUTE LABOUR.

MORTGAGE.

Construction of—Principal to fall due in default of interest after demand—Action against some only of the mortgagors—Necessity for demand on all—Plea in abatement.]

—Defendants, B. and S., with two others, executed a mortgage to the plaintiff to secure £4000 and interest, by which it was agreed that if default should be made in any payment of interest within one month after it should have become due "and been demanded," then the whole principal money and such unpaid interest should immediately be payable. The plaintiff sued defendants alone upon this mortgage for the principal and interest, making no mention of the other mortgagors, and alleged in the declaration that though an instalment of interest was overdue, and although payment thereof had been demanded from defendants, yet that they had not paid within one month after such demand. Defendant B. pleaded that no demand of said interest was made, as in the declaration alleged. Defendant S. pleaded, as to the principal sum, that he made the mortgage jointly with defendant B. and the other two mortgagors, L. and H., and that no demand of interest was made on the defendants and the said L. and H. A demand on defendants was proved, but not on the others.

Held, that the plea of defendant S. was bad, and that the plaintiff was entitled to recover, for the other mortgagors not being sued, and defendants not having pleaded in abatement, it was sufficient to prove a demand upon defendants only. *Semble*, that such a covenant is not to be looked upon in a court of law as a penalty, but merely as fixing the credit to be allowed for the principal. *Held*, also, that the plaintiff was entitled to succeed on the plea of defendant B., for the demand on defendants was proved, as alleged in the declaration. *Case v. Burton and Sadleir*, 540.

See CHATTEL MORTGAGE.—EJECTMENT, 1.—ESTOPPEL, 2.

MUNICIPAL CORPORATIONS.

1. *Village corporations—Duty to maintain crossings.*—The plaintiff, living in an incorporated village, laid a plank from his door across the ditch to the street, by which he was in the habit of crossing, although the ditch was deep there, and he might, by going down the sidewalk a short distance, have crossed where it was shallow. In crossing by the plank at night he fell off and broke his leg; and he thereupon sued the corporation, alleging that it was their duty to have maintained a proper crossing from his house to the street. *Held*, that there was no such duty incumbent on the defendants, and that the action could not be maintained. *McCarthy v. The Corporation of the Village of Oshawa*, 245.

2. *Action against treasurer for money not paid over—Evidence of order to pay out moneys—Verbal order—Estoppel.*—In an action by a municipal corporation against their treasurer on his bond, charging him with not having paid over moneys received, it appeared that

the Corporation had a contract with one E. to build bridges for them; E. wanting money got the reeve to endorse his note for \$600, which was discounted by defendant at the Niagara District Bank, of which he was agent, as well as treasurer of the municipality. A few days after another note for \$400 made by E. and endorsed by other persons, one a member of the Corporation, was discounted at the same bank. When these notes were about to fall due a meeting of the council took place, at which defendant was present, and the reeve swore that it was then understood that the council should assume these two notes, and he thought the defendant was authorised to charge them both to the Corporation; but other councillors examined did not agree with the reeve in their recollection of what took place; and the only resolution or minute in writing was that the council should give their note for \$700, to be used in the Niagara District Bank by defendant. This note was accordingly made by the reeve, and endorsed by the other members. *Held*, that under these facts, the treasurer had no right to charge the council with the remaining \$300.

In an account rendered to the council by defendant this \$1,000 was charged as paid to Ellsworth, and it was asserted that they had made subsequent payments to him, assuming the account to be correct. The facts did not shew this to be the case, but *semble*, that the council would not have been bound by omitting to notice or object to this item, whatever might be the effect if the account had been regularly audited.

A treasurer of a municipality should not be permitted to act also as agent of a bank. *The Corpora-*

tion of the Village of Ingersoll v. Chadwick, 278.

3. *Payments by treasurer on verbal order—Action by council of succeeding year—Estoppel—Pleading—Equitable defence.*—The first count was upon the bond given by the treasurer, alleging moneys received and not paid over, the second count for money had and received. Defendant pleaded, on equitable grounds, to the first count, that while he was treasurer the corporation owed one E. a large sum of money, and thereupon, at a meeting of the council duly held, the reeve, in the presence and hearing of the council, and without objection, and with the verbal assent of the councillors, or a majority of them, gave the defendant, as treasurer, verbal orders to pay E. £250 on account of said debt, which defendant thereupon paid: that afterwards the council ordered defendant to render them an account of moneys paid and received by him for the Corporation, which he did, charging the Corporation in it with the money so paid to E.: that said council, being aware of such account and of said payment, charged the said sum against E., and afterwards by resolution directed the reeve to pay E. \$112.35 on account of their debt due to him, after crediting themselves with such payment; and the reeve thereupon required defendant in writing to pay said \$112.35, which defendant accordingly paid; and defendant alleged that the money claimed in said count as received by him and not paid over was the sum so paid by him to said E. as aforesaid. To the second count the same facts were pleaded, but the allegation at the end of this plea was, that the money so paid to E. as first aforesaid was the money in the count and in the introductory part of this

plea mentioned. *Held*, on demurrer, first plea good, being an averment that the money sued for was the \$112.35 paid by defendant on the resolution. Second plea bad, for the money there alleged to be sued for was the \$1,000, for the payment of which no sufficient authority was shewn. *Quære*, this action being by the council of the year after that in which the payment pleaded was made, whether the facts would have afforded any defence against the council who thus sanctioned the payment. *The same case*, 286.

4. 22 Vic., ch. 99, secs. 314-316—*Bridge between counties—Liability to rebuild, &c.—Arbitration.*]—The road forming the division line between the counties of Brant and Waterloo, deviated from the allowance about five miles before reaching the Grand River, and ran wholly within the county of Brant till it intersected the river, where a bridge was built nearly a mile south of the line, and the road then continued on the other side of the river until it again struck the boundary. This road and bridge had been in use nearly thirty years—the actual division line never having been opened throughout. The 22 Vic., ch. 99, sec. 314, (now repeated in Con Stats. U. C., ch. 54, secs. 327-9) enacted that in case a road or bridge lay wholly or partly between adjoining counties, the councils of the two municipalities, between which the road or bridge lay should have joint jurisdiction over the same, although the road or bridge might so deviate as in some places to be wholly or in part within one county: that no by-law of one municipality, with respect to such road or bridge, should have any force until a by-law had been passed in similar terms, as near as might be, by the other; and that

in case either omitted to pass a similar by-law, the respective duties and liabilities of each municipality, in respect to the road or bridge, should be referred to arbitration, as provided by the act. This bridge was destroyed in 1857, and the county of Brant passed a by-law providing that a new one should be erected, under the provisions of the act above referred to, to cost not more than £1400, of which they gave notice to the county of Waterloo, requesting them to pass a similar by-law. The county council of Waterloo thereupon appointed an arbitrator to act for them, giving notice at the same time that they disputed their liability to contribute. Two of the arbitrators afterwards made an award, determining that the proposed bridge was within the statute, and that the two counties were bound jointly to construct it. On motion to set aside this award: *Held*, that the bridge being wholly in the county of Brant, and off the division line, was not within the statute; but that as the arbitrators, therefore, had no jurisdiction, and the award was not made under the act, the court could not set it aside. *Quære*, whether under the statute the arbitrators have power to award when, and at what cost, the bridge shall be built, and to compel the respective counties to contribute, or whether it is intended merely that the two municipalities are to concur in the regulations as to tolls or otherwise. *Semble*, per Robinson, C. J., that the statute applies only where the deviation has been made to obtain a good line of road, not in order to suit the convenience of either county. *In the matter of Arbitration between the Corporation of the County of Brant, and the Corporation of the County of Waterloo*, 450.

5. *Work and labour*—*Plea, that the debt was incurred in previous years without authority, and not provided for.*]—Declaration against the corporation of the Town of Peterborough for 1860, for work and materials, and for goods and money supplied "to aid and assist in the construction of a certain bridge across the river Otonabee, connecting the boundary line between the townships of Otonabee and Douro, in said county of Peterborough, with the boundary line between the township of Smith and the town of Peterborough. *Pleas* 1.—That the cause of action arose for and concerning a debt incurred and falling due during 1859, which was not within the ordinary expenditure of the corporation for that year, and for which no estimate was made and no rate imposed. 2. That the debt was incurred in 1859, for assisting to build a bridge not within the municipality, which debt was not authorised by any by-law, nor any rate provided therefor. 3. That the bridge was not on the bounds of the said town of Peterborough. *Held*, on demurrer, that the first and second pleas shewed a good defence; and that the third plea was also good, for the declaration sufficiently shewed that the bridge was not *within* the town, though that was not negated by the plea. *Scott et al. v. The Corporation of the Town of Peterborough*, 469.

6. *By-law*—*Objection not apparent on the face—Refusal to quash.*]—Upon an application to quash a by-law passed to close up a road, it appeared that the notices required by law had not been regularly given, but it was shewn that the applicant knew that the step was in contemplation, and had expressed his intention not to take any part in the matter. Under these

circumstances the court refused to quash the by-law, which was not illegal upon the face of it. *Lanson and the Corporation of the Township of Reach*, 591.

Liability on orders by school trustees accepted by treasurer for teacher's salary, and for refusal to levy rate.]—See COMMON SCHOOLS, 2, 4.

See ASSESSMENT.—EMBEZZLEMENT.—PEEL (County of).—PLEADING.—SHERIFF.—SNOW.—STATUTE LABOUR.

NEW ASSIGNMENT.

Of second departure from the limits.]—See LIMITS, 2.

NEW TRIAL.

A second new trial was refused, though the verdict appeared to be against the weight of evidence. *Orr v. Spooner*, 601.

Three perverse verdicts in county court—Appeal—New trial ordered.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

Notice of non-payment denied—Verdict for plaintiff on insufficient evidence—New trial refused.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

As to one of several defendants convicted on indictment.]—See CONSPIRACY.

Affidavits of jurors rejected on application for.]—See CONSPIRACY.

Refused on technical objections, the verdict being just.]—See COVENANTS FOR TITLE.

Granted in criminal case.]—See EMBEZZLEMENT.

Refused where verdict upheld a will disputed on the ground that testator had not a disposing power.]—See WILL, 1.

See COUNTY COURT.—EJECTMENT, 3.—INSURANCE.—LIBEL, 1.—TAXES.

NOTICE.

Of further insurance effected by plaintiff.]—See INSURANCE, 2, 3.

Of loss, &c.]—See INSURANCE, 4.

To prosecutor of intended publication of libel—Effect of.]—See LIBEL, 1.

Requiring land for railway.]—See RAILWAYS.

Of Intention to pay before the expiration of the time allowed, when necessary.]—See SALE OF LAND, 4.

NOTICE TO QUIT.

The plaintiffs claimed under a will giving them a life estate in the land, and the defendant did not hold under them, and by his notice denied their title. *Held*, that no notice to quit nor demand of possession was necessary before bringing ejectment. *Scouler et al. v. Scouler*, 106.

See EJECTMENT.

NOTICE OF TITLE.

See EJECTMENT, 2.—NOTICE TO QUIT.

ORDNANCE.

Land vested in Officers of Ordinance—Claim for Dower—Ordinance Vesting Act, 7 Vic., ch. 11.]—See DOWER, 2.

OVERHOLDING TENANT.

Consol. Stats. U. C., ch 27—First jury discharged.]—Where upon a commission issued against an overholding tenant, the first jury summoned could not agree, and were discharged. Held, that the authority of the commissioner was not determined, but that another jury might be summoned and an effectual inquisition held. *Held*, also, that on the evidence set out below this was a case within the act, and that the finding against defendant as an

overholding tenant was warranted. *In re Woodbury and Wife, and Marshall*, 597.

PARLIAMENT.

Power of Speaker to compel attendance of witness on the limits.]—See LIMITS, 3.

Privilege of members from arrest under order to commit for not appearing to be examined.]—See PRIVILEGE.

PARTNERSHIP.

Deeds—Construction—Creation of partnership.]—Two deeds of the same date were executed by D. B., one of the defendants, who lived chiefly at Montreal, and by W. B. and H. I., the last two being then in partnership at Hamilton, under the name of B. I. & Co. The first deed recited that the firm were indebted to D. B. for goods supplied and agency, in £1,454 4s. 1d., the time for payment of which he had agreed to enlarge as therein set forth; and they thereby covenanted to furnish him with a yearly balance sheet to shew the state of their business, and that they would pay him the sum due with interest, as follows, namely, £6,000 by instalments specified, and after satisfying that sum that the profits of each year, after deducting expenses and a certain sum for each partner, should be applied towards payment of the balance due. It was provided that said D. B. should until his debt was paid have free access to their books, and although he should have power to enlarge the time for payment of any part of his claim beyond the days specified, yet that in case of default in payment according to the covenant, either of the £6,000 or the balance, from the profits, as set forth, he should be entitled to enforce pay-

ment of the whole principal and interest then unpaid. The second deed recited the indebtedness of the firm to D. B., and the enlargement of the time for payment; and it was thereby agreed that until the final discharge thereof, or until an election by said D. B., of the alternative plans thereafter proposed for the settlement thereof, the said D. B. should act as agent of the firm in the purchase and shipment of goods, &c., and that in consideration thereof, instead of commission, they should pay him £500 a-year. It was then provided that so soon as the capital stock of each of the partners should equal the sum then due to D. B., so that by transferring his claim to the firm he would have an equal third share, then he should be entitled to demand either to be admitted as a partner, or a bonus by way of compensation for such right, and on such demand being made and acceded to his annual salary should cease. No such election had been exercised, nor was it shewn that the circumstances of the firm had been such as to make it possible. *Held*, that D. B. did not become by either deed a partner in the firm. *Darling et al. v. David Bellhouse and William Bellhouse*, 268.

Whether created by provision in assignment for the benefit of creditors.—See ASSIGNMENT, 2.

See AMENDMENT.—INSURANCE, 4.

PAYMENT.

Bond for a deed, on payment within ten years—Right to pay and claim deed before expiration of the time.—See SALE OF LAND, 4.

See SATISFACTION.

PAYMENT INTO COURT.

See ESTOPPEL, 3.

PEEL, COUNTY OF.

County Town of Peel—19 Vic., ch. 66.]—*Held*, that the selection of a county town for the county of Peel, authorised by the 19 Vic., ch. 66, was sufficiently made by resolution, a by-law not being indispensable, and that such selection being final, a by-law passed afterwards appointing another place was illegal. *Ibson and The Provisional Corporation of the County of Peel*, 174.

PERJURY.

Indictment for perjury—Form of.]—Where it appears on the face of an indictment for perjury, that the statement complained of was made before a justice of the peace in preferring a charge of larceny committed within his jurisdiction, it is unnecessary to allege expressly that he had authority to administer the oath. *The Queen v. Callaghan*, 364.

PLEADING.

Note payable to municipal corporation—Plea of usury]—To an action on a promissory note for £110, dated the 20th of November, 1856, made by defendants, payable twelve months after date, to a municipal corporation, defendants pleaded that the note was given for £100, lent by plaintiffs to defendants for one year at ten per cent. interest, and for the interest. *Held*, plea bad, being no defence except as to the excess of interest above six per cent. *The Corporation of the Township of Westminster v. Fox et al.*, 203.

See ACTION, 1.—ARBITRATION AND AWARD, 2, 3.—BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 2, 3, 5.—COMMON SCHOOLS, 6.—CRIM. CON.—DIVISION COURT.—DOWER.—GUARANTEE.—INSURANCE, 1, 2.—INTERPLEADER, 1, 3.—LI-

BEL, 2.—MISTAKE.—MUNICIPAL CORPORATIONS, 3, 5.—PRINCIPAL AND SURETY.—PERJURY.—SALE OF LAND 1, 2, 3, 4.

POSSESSION.

Void assignment—Possession by assignee—Interpleader—His right as against execution creditor.]—See ASSIGNMENT, 3.

See LIMITATIONS, (Statute of)—SALE OF GOODS, 2.

PRACTICE.

1. *Will—Construction—Previous decision of C. P. thereon.*]—Where the construction of a will had been determined by the Common Pleas, this court held it to be settled by their decision, and conformed to it, without expressing any opinion on the question raised. *Scouler et al. v. Scouler*, 106.

2. *Leave reserved to defendant to move—Jury unable to agree—Right to move.*]—When leave has been reserved to defendant to move to have a verdict entered for him on legal objections taken, and the jury not being able to agree are discharged, he cannot make the motion. *McGuire v. Laing*, 508.

Verdict subject to award—Motion to arrest judgment.]—See ARBITRATION AND AWARD, 3.

Right of challenge by the Crown.]—See CONSPIRACY.

Application to quash conviction nunc pro tunc.]—See CONVICTION, 2.

See AMENDMENT.—BILLS OF EXCHANGE AND PROMISSORY NOTES, 2, 3.—COUNTY COURT.—EJECTMENT, 3.—ESTOPPEL, 3.—INSURANCE, 5.—LIMITS, 5.—MUNICIPAL CORPORATIONS, 6.—PRIVILEGE.—RIGHT TO BEGIN.—SERVICE—SET OFF.

PRINCIPAL AND AGENT.

See CROWN LAND AGENT.—STOCK.

PRINCIPAL AND SURETY.

1. *Bond for performance of duty—Change in the mode of remuneration.*]—To a declaration against a surety on a bond, conditioned for the faithful performance of his duty by W., so long as he should continue in the plaintiff's service in the capacity of their agent at N., or in any other capacity whatsoever, defendant pleaded, that W. entered into the plaintiff's employment as such agent at a certain commission or per-centage on the business done, and defendant executed the bond under the agreement that he should be so paid, and that afterwards the plaintiffs, without defendant's knowledge or consent, changed the mode of remuneration to a fixed salary. *Held*, no defence. *The Bank of Toronto v. Wilmot and Worts*, 73.

2. *Guarantee—Extension of time—Subsequent promise by surety—Pleading.*]—Defendant agreed in writing to be answerable for such goods as the plaintiff should furnish to one C., to the extent of £500. It appeared that by the usual course of dealing between the plaintiffs and C., the goods were sold to C. from time to time, at six months' credit, taking his notes; but the plaintiffs afterwards took three large notes amounting to nearly \$9,000, instead of several smaller ones overdue, and thus extended the original credit. This was done without defendant's knowledge or assent, but it was proved that afterwards, on being asked by one of the plaintiffs for security, he offered to convey a lot of land for £300, and said he would pay the rest as soon as he could. It was not shewn, however, that defendant was then aware of the credit having been extended, and the land was declined. *Held*, that the offer having

been made on a condition which was not accepted, and without knowledge of the facts, was not binding, and that defendant was discharged. *Semble*, the plaintiffs having taken issue on the plea alleging discharge by the extension of time, that the subsequent promise to pay was not admissible in evidence. *Kerr et al. v. Cameron*, 366.

See DIVISION COURT BAILIFF.—INDEMNITY.

PRIVILEGE.

Examination of judgment debtor—Order to commit—Privilege of parliament—Consol. Stats. U. C., ch. 24, sec. 41.]—An order to commit to close custody for not attending to be examined pursuant to a judge's order, is to be looked upon as a commitment for contempt, not as a commitment in execution.

A member of parliament therefore is not privileged from arrest under such order, and a party committed under it is not entitled to his discharge on payment of the debt and costs.

Semble, that if the order be so framed as to entitle defendant to his discharge on payment of the claim, the privilege of parliament would avail against it. *Henderson v. Dickson*, 592.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

RAILWAYS.

Notice requiring lands—Deviation from plan filed—Effect of—Arbitration—Ejectionment.]—The plaintiff, having been served with a notice by defendants requiring a part of his land for their road, refused to allow them to enter, but afterwards

withdrew his opposition, on condition that it should not in any way prejudice his rights against the company, and the defendants then entered and constructed their railway. Arbitrators were appointed to determine the amount of compensation to be paid to him, but before the award had been made the defendants desisted from their notice, which the court held that they had a right to do, and the plaintiff therefore failed in an action brought by him upon the award. The company afterwards served another notice, and as the plaintiff did not appoint an arbitrator to act for him, the judge of the county court appointed one D. as sole arbitrator, who made an award, reciting that he had inspected the land taken, and awarding £364 10s. to be paid to the plaintiff. This sum the defendants paid into court, long before this suit, and they had continued in possession of the land since it was taken by them before the first arbitration.

It appeared that two lines for the railway had been surveyed and staked off through the plaintiff's lands before their first notice, and the line shewn by their plan and book of reference filed pursuant to the act was the first, which was not adopted, though in the notices served on the plaintiff the land required was stated to be that "staked off by the said company according to the plan of the said railway." The deviation, however, of the two lines was slight, much less than a mile, and it was admitted that the land embraced in each award was that actually taken for the railway. The plaintiff having brought ejectionment for this land:

Held, that he could not recover, for that, notwithstanding the deviation, he was confined by what had been done to his claim by arbitra-

tion for the land taken. *Grimshawe v. The Grand Trunk Railway Company of Canada*, 493.

REASONABLE TIME.

For giving notice of further insurance.]—See INSURANCE, 2, 3.

For furnishing certificates, affidavits of loss, &c.—Whether a question for court or jury.]—See INSURANCE, 2.

REGISTRATION.

Of assignments, and chattel mortgages.]—See ASSIGNMENT, 4.

RELEASE.

Effect of provision for, in an assignment for the benefit of creditors.]—See ASSIGNMENT, 1, 2.

RENT.

See LANDLORD AND TENANT, 2.—LEASE, 1, 2.

REPLEVIN.

See LANDLORD AND TENANT, 3.—SALE OF GOODS, 3.

RESOLUTION.

Selection of County Town by resolution—Necessity for by-law.]—See PEEL (County of.)

RESTRAINT OF TRADE.

See ARBITRATION AND AWARD, 3.

RIGHT TO BEGIN.

The only plea was a further insurance effected by the plaintiff, without notice to defendants or endorsement on their policy, on which issue was taken, and at the trial defendants admitted that if they should fail to prove their defence the plaintiff would be entitled to a verdict for the full amount insured. *Held, per Robinson, C. J.*,

that they were entitled to begin. *Jacobs v. The Equitable Insurance Company*, 250.

ROAD.

See HIGHWAY.

SALE OF GOODS.

1. *Interpleader — Sale — Execution.*]—On an interpleader issue, it appeared that A. owned the wheat in question, which was stored with S. On the 8th of October he sold it to the plaintiff, and on the 10th gave him an order on S. for it, which S. accepted, and on the 11th the plaintiff paid A. the purchase money. On the 10th the sheriff went to seize the wheat under an execution against A., at the suit of one N., which had been in his hands since August, but S. told him that A. had no wheat there. On the 11th, however, the sheriff returned and seized, and on the 14th the execution at the suit of defendants was placed in his hands. *Held*, that the plaintiff was clearly entitled under his purchase as against the defendants' execution. *Tucker v. Ross et al.*, 295.

2. *Agreement to furnish saw logs — Delivery — Chattel Mortgage Act—22 Vic., ch. 96, sec. 19.*]—One H. agreed with B. to furnish him with from 8 to 10,000 saw logs, to be paid for on delivery, and a small sum was received by him on account. Afterwards H. agreed to get out logs for the plaintiffs, the money for them to be paid to one D., to whom H. was indebted. A large number were got out during the winter by H., and while on the ice he marked 1040 with the plaintiffs' mark. When the ice broke up all were floated down together and became mixed. The plaintiffs accepted and paid orders on them by H. in D.'s favour for £200 on

account, and afterwards a delivery was made by H. to them of 1040 logs, by delivering some in the name of that number out of the whole, which were still together. B., who had made large advances to H. on his agreement, then got execution on a judgment, which H. allowed to go by default, and under it seized all the logs. *Held*, that the plaintiffs were entitled to recover for the 1040 logs so sold and delivered to them, and that neither the Chattel Mortgage Act nor the 22 Vic., ch. 96, sec. 19, would have applied to such sale, even if the jury had not found, as they did, that there was an actual and continued change of possession, so far as there could be under the circumstances, and that H. was not insolvent. *Middlebrook et al. v. Thompson, Sheriff*, 307.

3. *Sale of goods—Incomplete bargain—Subsequent sale by vendor.*—One C. sold some timber to the plaintiff, and received \$20 on account, but it was to be culled and measured in order to complete the purchase, and the plaintiff did not call to have this done, and to pay the balance of the purchase money; C. therefore sold to defendant, from whom the plaintiff replevied. At the trial it was not objected that the sale to the plaintiff was not complete, but the bargain between them was denied upon the evidence, and that point having been left to the jury they found for the plaintiff. *Held*, that the defendant was entitled to succeed, for the property never passed to the plaintiff so as to prevent C. from selling again; but as the objection had not been taken at the trial, a new trial was granted only with costs to abide the event. *Paton v. Currie*, 388.

Sale of goods—Mortgage for the price—Assignment of the mortgage—

Insolvency of mortgagee—22 Vic., ch. 96.—See ASSIGNMENT, 3.

See LIEN.

SALE OF LAND.

1. *Land sold—Common Count for—Contract for sale—Statute of Frauds.*—In an action on the common count for land sold, it appeared that the land in question was put up at auction under hand-bills signed by the plaintiffs, and having been knocked down to defendant his name was entered as purchaser in a book by the auctioneer's clerk, and he paid the deposit required down, but afterwards refused to pay the subsequent instalments. A bond to convey had been executed by the plaintiffs, and left ready for defendant, with a bond for payment of the money, which he did not execute. *Held*, that the plaintiffs could not recover, for the land was not conveyed, and therefore an action on the common count would not lie. *Held*, also, that there was no contract for sale sufficient to satisfy the Statute of Frauds. *Thomas and Beatty v. Ross*, 370.

2. *Agreement for sale of land—Construction—Condition precedent—Dependent and independent covenants—Neglect to furnish abstract—Covenant proved in part—Right to recover.*—A. and B. entered into an agreement under seal, by which A. sold to B. certain land for £150, payable £50 in three months and the remainder in two instalments, on the 12th of January, 1858 and 1859, with interest. B. covenanted to pay at the days named, and A. covenanted "on payment of the said sum of money with interest as aforesaid, in manner aforesaid," to convey and assure the land to B., his heirs and assigns, "by a good and sufficient deed in fee simple, as per abstract of title to be furnished by

the said A. within a reasonable time before the 12th of January, 1859 ;'' and it was stipulated that time should be of the essence of the agreement, and that unless the payments were punctually made, A. should be at liberty to re-sell the land as if the contract had not been made.

B. paid the first two instalments, and A. never furnished any abstract, but on the 13th of January, 1859, he tendered to B. a conveyance, which B. refused. On the 20th B. tendered the remaining instalment and interest, and demanded an abstract, which was not given.

A. then sued B. for the instalment unpaid, to which B. pleaded that no abstract was furnished to him, and that on the 12th of January, 1859, he tendered the money if A. would then furnish the abstract and convey, which he refused to do.

And B. brought a cross action against A. to recover back the money paid, alleging that A. covenanted to furnish him with an abstract of title within a reasonable time before the 12th of January, 1859, and to convey on that day, but did neither. A. denied the covenant.

Held, 1. That A. was entitled to succeed in his action, for the furnishing the abstract was not a condition precedent to payment of the last instalment, and B. did not tender the money on the 12th.

2. That he was also entitled to a verdict in the suit brought against him, for his covenant was not to convey on the 12th of January, 1859, absolutely, but upon payment of the money agreed ; and although he did covenant to furnish an abstract as alleged (the agreement in that respect being held to amount to a covenant) yet the covenant declared upon was not proved. *Wil.*

son v. Wittrock. Wittrock v. Wil-
sod, 391.

3. *Action for purchase money—Equitable plea claiming deduction for failure of title to part—Demurrer.*—

Declaration on defendant's covenant to pay £133 6s. 8d., and interest.

Plea, on equitable grounds, as to £96 6s. 8d., part thereof, that defendant purchased from plaintiff the west half of the south half of lot 7, in the 4th concession of London, which the plaintiff then had in his possession, and of which he had enclosed that portion on the north side of the Thames, which runs through said quarter lot, leaving $5\frac{9}{10}$ acres on the north side of the river: that, relying upon the fact that the conveyance which the plaintiff had lately taken to himself was of the west half of the south half of the lot, whereby the plaintiff appeared to be the owner of said quarter lot ; and relying also on the plaintiff's representation that a stone quarry on the river belonged to the plaintiff, from which defendant had from time to time procured stone before the purchase, and which formed an important portion of the value thereof ; and relying chiefly on the fact that the plaintiff had enclosed that part of said quarter lot north of the river, and represented and claimed it as belonging to him—he, the defendant, purchased from the plaintiff said quarter lot, at the rate of £15 10s. per acre, or £775 for the whole, and gave a mortgage thereon for the balance of the purchase money, payable by instalments, of which he had paid all but the one sued for: that since paying the last instalment he discovered that the plaintiff did not at any time own that part of said quarter lot north of the river, and never had any right thereto ; and defendant claim.

ed a rateable deduction of the purchase money in respect thereof, amounting to £96 6s. 8d. *Held*, on demurrer, plea bad, as shewing no equitable defence. *Hendra v. Maffatt*, 444.

4. *Bond to convey land—Construction of—Purchase money to be paid within ten years—Right to pay within the period and claim deed—Tender of deed for execution—Want of title—Pleading.*—The plaintiff declared on a bond, reciting that the defendant had agreed to sell to him certain land for £600, of which £50 was to be paid down, and the remainder “*within ten years from the date thereof*,” with interest thereon half-yearly; and conditioned that the defendant “on receiving the said principal money and interest at the days and times, and in manner thereinbefore mentioned for payment thereof,” should “sign, seal, deliver, and execute” unto the plaintiff, a good, valid, and sufficient deed in fee simple of said land, and so convey the same to him free from all incumbrances. The breach assigned was, that although the plaintiff had paid the £50, and had also paid £250 on account of interest, and was at all times ready and willing, and offered to pay to defendant the balance of principal and interest, on receiving from him such deed, yet that defendant did not, could not, and would not give him said deed, and could not then nor ever could convey or give any title to said land. *Held*, on demurrer, that the declaration was bad, for, 1 The condition being to convey on receiving the purchase money *within ten years*, the defendant could not be compelled to convey before the last day of that time, or at least not without notice of the intention to pay at an earlier day, and a tender accordingly, which was not averred. 2. The offer al-

leged was only to pay on receiving a deed, and defendant was entitled first to receive the money. 3. The plaintiff was bound to tender a deed for execution, and was not relieved by the general allegations in the declaration, that he could not give a good title, &c. *Burns v. Boyd*, 547.

For Taxes.—See TAXES.

See COVENANTS FOR TITLE.—FIXTURES.

SATISFACTION.

Assignment of judgment—Satisfaction—Subsequent sale.—The sheriff held an execution against A., B., and C., upon a note on which C. was the last endorser, and the others therefore liable over to him. Goods belonging to A. having been seized, C. paid the bailiff £100, part of the debt, and the sheriff accepted and paid a draft by the plaintiffs’ attorney for the whole. On the same day that this draft was accepted the bailiff took an assignment of the judgment, and afterwards sold the goods under a *ven. ex.*, when they were bought by C., and out of the purchase money the bailiff paid the balance due to the sheriff. *Held*, that the payment made by the sheriff had satisfied the judgment, and that the sale therefore was illegal. *McLeod et al. v. Fortune et al.*, 100.

SCHOOLS.

See COMMON SCHOOLS.

SERVICE.

Writ of summons—Service by mistake on defendant’s son—Same name.—In an action for calls upon stock subscribed and on promissory notes, the writ of summons, directed to James Shaw, was by mistake served by the

sheriff upon his son of the same name, who a few days after gave it to his father, the defendant, telling him that the sheriff had made a blunder; and the defendant, at his son's request, took it to an attorney, who, upon defendant's instructions, entered an appearance, and afterwards put in pleas. *Held*, that defendant was sufficiently served, and that the plaintiffs could recover against him. *The Provincial Insurance Company of Canada v. James Shaw*, 360.

SET-OFF.

Malicious prosecution--Application to set off judgment--Assignment of plaintiff's verdict.]—The plaintiff had obtained a verdict against defendant in an action for malicious prosecution, but had not yet entered judgment, leave being reserved to move, and defendant, in moving for a nonsuit or new trial on the evidence, asked also to be allowed to set off a judgment which he had obtained against the plaintiff against that to be entered on this verdict, consenting in that event to waive his motion against the verdict. The court granted the application, notwithstanding an assignment of such verdict, which was alleged to have been made between the trial and term by the plaintiff to a third party in satisfaction of a debt. *Orr v. Spooner*, 601.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 1.

SHERIFF.

Sheriff's fees—Panels for County Court and Quarter Sessions—Mileage for summoning jurors—Money had and received—Amount due uncertain—Reference—Right to recover back overcharge—13 & 14 Vic., ch. 55, 14 & 15 Vic., ch. 65, 16 Vic., ch.

120.]—The sheriff of Haldimand for many years, since 1853, had charged for the panel of jurors for both the County Court and Sessions, and mileage for summoning each juror according to the distance from the court house to his residence, without reference to the distance actually travelled to serve all. These charges had been paid to him without question, upon the affidavit required by the act verifying his accounts, which did not shew on what principle the charges had been made, nor did it appear that the county council, or their treasurer, were aware of it before making the payments. There was no audit of the sheriff's account as between him and the treasurer, who paid him; but the treasurer's accounts, including them, had been regularly audited and passed by the council.

The council sued the sheriff for money had and received, to recover back the over-charge, contending that the mileage had been computed upon a wrong principle, and that he was entitled to charge only for one panel. A verdict was taken, subject to the opinion of the court as to the right; and it was agreed that if in their opinion the defendant was liable to refund any thing, the amount should be settled by the judge of the county court.

Held, that the sheriff was authorised to charge for both panels, but that he was entitled only to mileage for the distance actually travelled to summon all the jurors.

Held, also, that the over-charge might be recovered back by the county in an action for money had and received. *Burns, J.*, dissenting, on the ground that the statutes afforded room for doubt as to the right: that though the sheriff might have charged too much, the mode of charging contended for by the

plaintiffs was not correct; and that as the fees had been demanded and paid for many years without question, the sheriff should not be called upon to shew the exact sum to which he was entitled. *The Corporation of the County of Haldimand v. Martin, Sheriff*, 178.

See ESTOPPEL, 3.—INTERPLEADER.
—LIMITS.—SATISFACTION.—TRESPASS.

SHERIFF'S DEED.

Misdescription of defendant's interest in the land sold.—See LEASE, 2.

SHERIFF'S SALE.

Whether purchaser at can sue on covenants running with the land.—See COVENANTS FOR TITLE.

See GUARANTEE.

SHIPS.

See ESTOPPEL, 3.

SNOW.

Snow falling from roof—Injury thereby—Liability.—There is no duty at common law upon owners or occupiers of houses to remove snow from the roof, and no liability for accidents caused by its falling.

The defendants, a city corporation, owning land in the city, leased it to one H. upon certain conditions as to building, and he erected a house upon it under the directions of their architect. The lower story was occupied by one S. as lessee of H., and the upper story and garret by defendants. There was no evidence of any faulty or negligent construction of the house or roof, nor of any by-law passed by defendants to regulate the removal of snow. The plaintiff having been injured while passing along the street by snow falling from the roof: *Held*, that defendants were not lia-

ble. *Lazarus v. The Corporation of The City of Toronto*, 9.

SPEAKER'S WARRANT.

To defendant on the limits to attend as a witness before the House—How far an excuse for departure.—See LIMITS, 3.

STATUTES (CONSTRUCTION OF.)

- 4 Anne, ch. 16, sec. 20.—See Limits, 2.
- 14 Geo. III., ch. 78.—See Fire.
- 6 Geo. IV., ch. 7.—See Taxes.
- 5 W. IV., ch. 1, sec. 8.—See Evidence, 1.
- 10 & 11 Vic., ch. 19.—See Taxes.
- 2 Vic., ch. 15.—See Indian Lands.
- 7 Vic., ch. 11.—See Dower, 2.
- 9 Vic., ch. 11.—See Will, 4.
- 10 & 11 Vic., ch. 23.—See Conviction.
- 10 & 11 Vic., ch. 95.—See Statute Labour.
- 12 Vic., chs. 9, 30.—See Indian Lands.
- 13 & 14 Vic., ch. 48.—See Common Schools.
- 13 & 14 Vic., ch. 53.—See Division Court, 2.
- 13 & 14 Vic., ch. 55.—See Sheriff.
- 13 & 14 Vic., ch. 74.—See Indian Lands.
- 13 & 14 Vic., ch. 79, sec. 1.—See Building Society, 2.
- 14 & 15 Vic., ch. 51.—See Railways.
- 14 & 15 Vic., ch. 65.—See Sheriff.
- 16 Vic., ch. 19.—See Evidence, 1.
- 16 Vic., ch. 120.—See Sheriff.
- 16 Vic., ch. 175.—See Limits, 4.
- 16 Vic., ch. 182.—See Assessment.
- 19 Vic., ch. 66.—See Peel, (County of.)
- 20 Vic., ch. 3.—See Assignment, 4.—Chattel Mortgage.—Sale of Goods, 2.
- 20 Vic., ch. 23.—See Elections.
- 20 Vic., ch. 26.—See Indian Lands.
- 20 Vic., ch. 63.—See Articled Clerk.
- 22 Vic., ch. 34.—See Married Woman.
- 22 Vic., ch. 85, sec. 6.—See Usury.
- 22 Vic., ch. 96, sec. 19.—See Assignment, 1, 2, 3.—Sale of Goods, 2.
- 22 Vic., ch. 99, secs. 314-316.—See Municipal Corporations, 4.
- Consol. Stats. U. C., ch. 19.—See Division Court, 1.
- Consol. Stats. U. C., ch. 24, sec. 41.—See Privilege.
- Consol. Stats. U. C., ch. 27.—See Overholding Tenant.
- Consol. Stats. U. C., ch. 32.—See Evidence, 2.
- Consol. Stats. U. C., ch. 35.—See Articled Clerk.

Consol. Stats. U. C., ch. 50.—See Harbour Company.

Consol. Stats. U. C., ch. 103, sec. 9.—See Libel, 2.

STATUTE OF FRAUDS.

See FRAUDS, (Statute of.)

STATUTE OF LIMITATIONS.

See LIMITATIONS, (Statute of.)

STATUTE LABOUR.

Streetsville Plank Road Company—10 and 11 Vic., ch. 95, sec. 20—*Right to statute labour.*—The plaintiffs, a plank road company, were incorporated by the 10 & 11 Vic., ch. 95, which authorised them to make a road from the town of Streetsville to different points specified, and enacted that they should have the right to claim the statute labour, by commutation or otherwise, to the extent of one half concession on each side of their road, and to collect it from the persons liable. The village of Streetsville, which was incorporated in 1857, was within one half concession of the plaintiffs' road, which ran through it. In 1858, the village council imposed and collected a rate, of which a certain sum was for commutation of statute labour. *Held*, that the plaintiffs were entitled to recover from defendants as money had and received so much of this sum as was received in respect of persons or property forming no part of the town of Streetsville mentioned in the plaintiffs' act of incorporation, but within half a concession on each side of their road. *The Streetsville Plank Road Company v. The Corporation of the Village of Streetsville*, 62.

STOCK.

Action for calls—Proof of transfer—Estoppel.—To an action

brought for two calls on stock, one made on the 9th of December, 1858, and the other on the 17th of June, 1859, defendant paid into court the amount of the first call, and pleaded never indebted to the second. At the trial he admitted having held the stock, but alleged that on the 5th of February, 1858, he had transferred it to M., and he accounted for having subsequently paid the first call sued for by stating that he had given a bond to the plaintiffs to pay that call, and therefore did so notwithstanding the transfer. To prove the transfer the plaintiffs' transfer book was produced, in which it was entered, the transfer and acceptance being signed by D., who was then the plaintiffs' manager, as attorney for both parties, and their stock book was also produced, in which the stock appeared in M.'s name since the 5th of February, 1858. The powers of attorney were not produced, but the plaintiffs' secretary, who produced the books, said he believed they existed, and that all the papers were in the hands of the plaintiffs' attorney. A notice to produce had been served for a previous assize, though not for this, but defendant's attorney had verbally told the attorney for the plaintiffs that he would require the same papers. *Held*, that the transfer was sufficiently proved for the purposes of this action, being signed by the plaintiffs' officer, as agent for both parties, and recognised in their books: that it was unnecessary to produce the bond given by defendant; and that the defendant was not estopped by having paid the call made in December, 1858, from denying that he had transferred the stock before the call was made. *The Provincial Insurance Company of Canada v. Shaw*, 533.

STREETSVILLE PLANK ROAD COMPANY.

See STATUTE LABOUR.

SUMMONS, (WRIT OF.)

Service by mistake on defendant's son of same name.]—See SERVICE.

SURETY.

See PRINCIPAL AND SURETY.

TAIL.

Will—Construction—Estate tail, or for life—Power of tenant in tail to convey in fee.]—See WILL, 3.

TAXES.

Sale for taxes—Ejectment by purchaser—Evidence of distress—Description of land in sheriff's deed.]—In ejectment brought upon a sheriff's deed for taxes, the plaintiff shewed that the lot was wholly in a wild state, with no one living on it, and that an inspection had been made to ascertain if there was any distress, but none was found. The defendant proved that certain persons were then in the habit of making sugar upon the rear of the lot, and used to leave there two kettles and their sap-troughs, which might have been worth the sum due. The jury having found for defendant: *Held*, that such evidence should not have been allowed to invalidate the sale, and a new trial was granted without costs.

Defendants claimed under two deeds from the sheriff, made upon different sales. One described the land as thirty acres of the lot, "to be measured according to the statute in that case made and provided," the other as "twenty-five acres" of the lot, giving no further description. *Held*, that the first deed was sufficient, the second

not. *Fraser v. Mattice and Broefle*, 150.

See ASSESSMENT.

TITLE.

Plea bringing title in question in county court.]—See COUNTY COURT.

Action on covenant for.]—See COVENANTS FOR TITLE.

See ESTOPPEL, 2.—SALE OF LAND, 2, 3, 4.

TRANSFER OF STOCK.

Proof of.]—See STOCK.

TREASURER.

Of municipal corporations.]—See MUNICIPAL CORPORATIONS, 2, 3.

TRESPASS.

A person who indemnifies the sheriff for seizing goods, does not by that act become liable as a trespasser. *McLeod et al. v. Fortune, Sheriff et al.*, 98.

UNCERTAINTY.

In description of land in conveyance of highway by surveyor.]—See HIGHWAY.

See DESCRIPTION OF LAND.

USURY.

22 Vic., ch. 85, sec. 6—*Construction of—Life assurance.*]—The exception in the last clause of 22 Vic., ch. 85, which prevents corporations, &c., "heretofore authorised by law to lend or borrow money," from charging more than six per cent. interest, applies only to corporations created for the purpose of lending money, or at least expressly authorised to do so, not to all who by the general law are allowed to lend it.

The defendants, a Life Insurance

Company, were in the habit of lending money, but made it a condition that all borrowers should insure their lives with them for double the amount of the loan. *Seemle*, that even if the exception above mentioned had applied to them, this would not constitute usury. *The Edinburgh Life Assurance Company v. Graham*, 581.

See PLEADING.

VENDOR AND VENDEE.

See FIXTURES.—SALE OF GOODS.
—SALE OF LAND.

WATERWORKS COMPANY.

Agreement between City of Kingston and Kingston Waterworks Company—Construction of.—See AGREEMENT.

WILL.

1. *Disposing power — Conflicting evidence—New trial refused.*—The court in this case, though the weight of evidence seemed the other way, refused to set aside a verdict upholding a will made by testator in his last illness, which was disputed on the ground that he was not competent at the time to exercise a disposing power, though his strength of mind when in health was not doubted. *Harwood v. Baker*, 3 Moore P. C. C. 282, commented on. *Brown et al. v. Bruce*, 35.

2. *Construction—Estate for life or in fee.*—Under the following devise, proved in 1830: "And as touching such worldly estate as wherewith it has pleased God to bless me in this life, I give, demise, and dispose of the same in the following manner and form: first, I give and bequeath to Mary, my dearly beloved wife, (who I likewise constitute, make and ordain sole executrix of this my last will

and testament,) all and singular my lands, messuages and tenements, together with my ready cash, household goods, debts and moveable effects, by her freely to be possessed and enjoyed." *Held*, that the widow took a fee in the land. *Hurd v. Levis*, 41.

3. *Construction—Devise of land in Upper Canada dependent on performance of condition as to land in Lower Canada—Conflict of laws.*—Testator, by his will made in 1842, devised the land in question, lot 37, to his son J., and to the plaintiff, Alexander, another son, lot 32, but directed that if J. should prefer lot 32 he should take it, and the plaintiff should then have lot 37. By a codicil he declared his will to be, that if his son Allan should not take holy orders, as he intended, then he should have lot 37 and J. lot 32, and the plaintiff the west half of lot 31; and he added, "the one brother may change or sell to the other with consent of the major part of the executors, but not out of the family; but should Allan not divide or give over in full an equal portion of the house in St. Paul's street, Montreal, as was his mother's intention, as appears by her last will, in which case I order and devise, that my said son Allan shall only receive of my property what has been willed to him in my last will, then this codicil to be null and void." The will of Mrs. Macdonell referred to, was made in Upper Canada in 1828, and devised the house mentioned to her son Allan, "with power to give an equal share to his sisters Helen, Catherine, and Harriet, and to his brother John." After the testator's death J. elected to take lot 32. Allan never took holy orders, but he had not divided the property in St. Paul street, but on the contrary had treated it as his own, and hav-

ing mortgaged it his interest was sold under a judgment to the mortgagees, who subsequently procured a release from the brother and sisters named in Mrs. Macdonell's will, of their interest, and obtained a judgment of distribution in Lower Canada. It was proved by two advocates from Montreal, that by the law of Lower Canada the will of Mrs. Macdonell vested an equal interest in the land in Allan and his brother and sisters named. *Held*, that the condition in the codicil respecting the property in Montreal must be governed by the law of Upper Canada as regarded its effect upon the land in question; but, *Held*, also, that whether the land did or did not vest in the brothers and sisters by the terms of the codicil was immaterial, for Allen's conduct was nevertheless a violation of the condition within the meaning of the testator, and he therefore did not take lot 37, but the original devise to the plaintiff took effect. *Burns, J.*, dissenting, and holding:—1. That if the will of Mrs. Macdonell could be held to vest an equal estate in the children in the property in Lower Canada, the failure of Allan to make a division would not defeat the devise to Allan of this land, for it was made by the law, but that her will must be governed by the law of Upper Canada, which would not give it that effect. 2. That the condition in the codicil must be rejected as insensible and inconsistent with the will, and that the defendant, who claimed under Allan, was entitled to succeed. *Alexander R. Macdonell v. Donald A. Macdonald*, 130.

4. *Construction—Estate tail or for life—Conveyance by tenant in tail—9 Vic., ch. 11.*—Testator, after devising certain land to his wife for life, provided that at her death the said land, together with the residue of his real estate, should be equally divided between his two daughters, to hold the same during their natural lives, and after the death of either her share to be equally divided between her children, share and share alike, as soon as they should attain the age of 21 or should marry, and in case either should die without leaving legal issue, then her share to be equally divided among the testator's brothers, &c. He died in 1832, leaving these two daughters, his only children. *Held*, that the widow took no interest in the residue: that the daughters took an estate tail therein; and that under 9 Vic., ch. 11, either of them could convey a fee simple in her share. *Sisson v. William Ellis, and Mary Eliza Anne Ellis, his wife*, 559.

See ESTOPPEL, 1.—MARRIED WOMAN.—PRACTICE.

WITNESS.

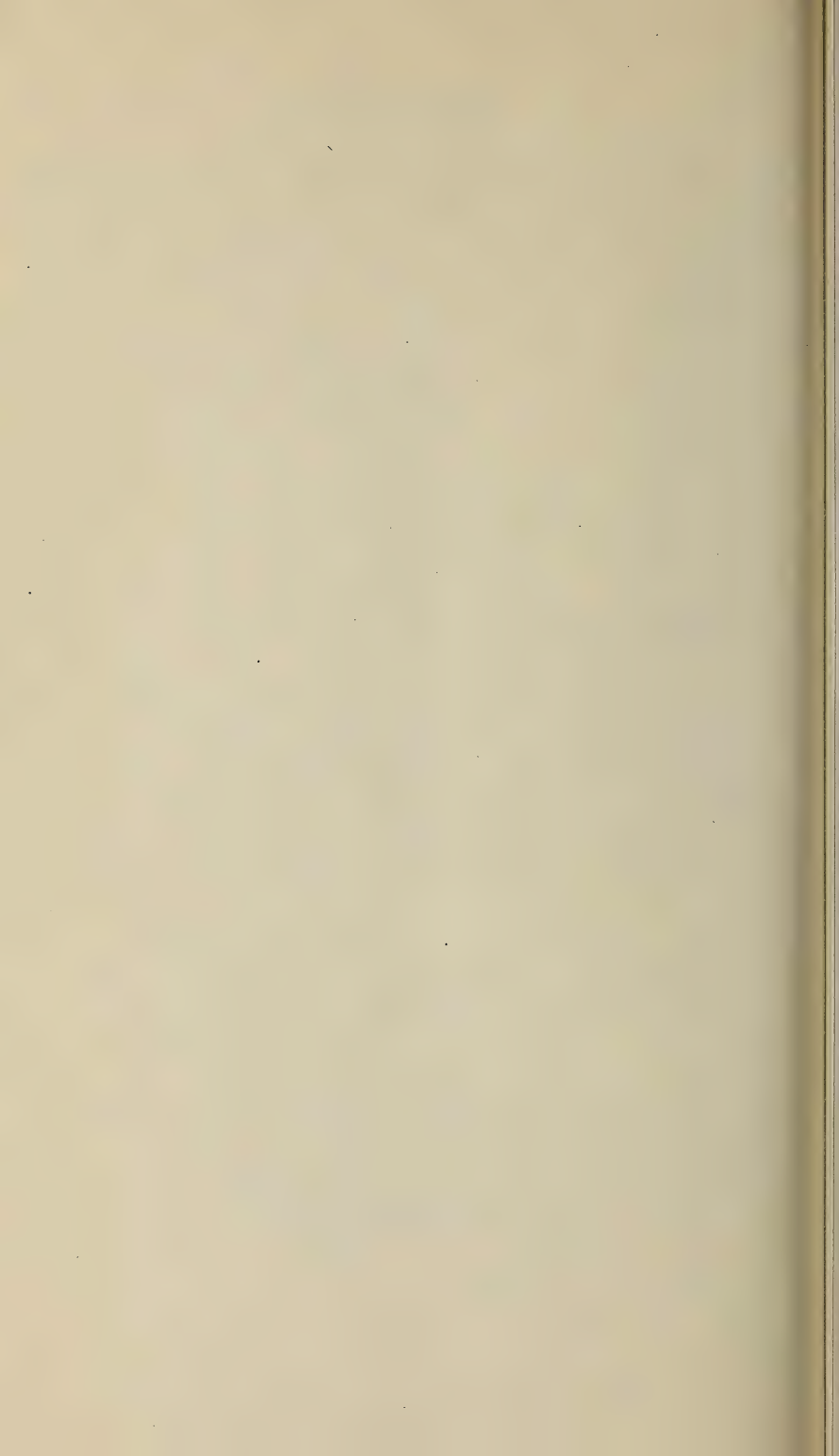
Deputy sheriff is a competent witness to assignment of bond to the limits.]
—See LIMITS, 2.—EVIDENCE.

WORDS (Construction of.)

"Submission" and "Reference."]
—See ARBITRATION AND AWARD, 2.

"As soon as possible."—See INSURANCE, 4.

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